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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES L. BUSSEY, JR.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I

DOES A TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE AN ACCUSED'S FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, WHEN THAT TRIAL COURT GIVES THE JURY THE *JEWELL* OR OSTRICH INSTRUCTION THAT REDUCED THE STATUTORILY PRESCRIBED AND JUDICIALLY APPROVED SPECIFIC INTENT STANDARD OF WILLFULNESS IN FELONY CRIMINAL TAX CASES TO A SHOULD-HAVE-KNOWN STANDARD OF NEGLIGENCE?

II

WHERE AN ACCUSED IS CHARGED WITH FELONY CRIMINAL TAX OFFENSES AND THE GOVERNMENT FAILS TO PROVE ANY AFFIRMATIVE ACT CONDUCT ON THE PART OF THE ACCUSED, DOES THE TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE THE ACCUSED'S FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY NOT GRANTING A JUDGMENT OF ACQUITTAL?

III

DOES A TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE AN ACCUSED'S FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL RIGHTS TO A FAIR TRIAL WHEN IT LIMITS THE ACCUSED'S ABILITY TO PRESENT EVIDENCE OF A LACK OF WILLFULNESS AS A DEFENSE BASED ON FEDERAL RULE OF EVIDENCE 608(b), IN FELONY CRIMINAL TAX CASES REQUIRING THE GOVERNMENT TO PROVE WILLFULNESS BEYOND A REASONABLE DOUBT?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Charles L. Bussey, Jr., respectfully prays for a writ of certiorari to issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on August 20, 1991. The Petition for Rehearing was denied on September 23, 1991.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (Appendix A, *Infra*, p. A-1) is reported in 942 F.2d 1241. The opinion of the District Court (Appendix B, *infra*, p. A-26) was not reported.

JURISDICTION

The judgment of the Eighth Circuit was entered on August 20, 1991; a rehearing was sought and denied on September 23, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

See Appendix F.

STATEMENT OF THE CASE

The St. Louis, Missouri based Petitioner (Bussey) was contacted in 1977 by his father *Charles Bussey, Sr. (Bussey, Sr.)*, a resident of Little Rock, Arkansas, about a potential real estate development project in Little Rock. Because Petitioner did not have much experience in such matters, he in turn contacted his former employer, William A. Thomas, an experienced real estate appraiser, developer and consultant, for assistance. In 1978, Thomas suggested that Petitioner, a practicing lawyer, form Eastview Development Company, Inc., to build an apartment complex on the Little Rock property. The Corporation was formed with *Bussey, Sr.* and two of his friends being the sole shareholders and officers of the corporation.

To finance the project, Thomas and Petitioner sought a Department of Housing and Urban Development (HUD) insured mortgage in April, 1980. In November, 1980, *Bussey, Sr.* was elected to the Little Rock City Council. After the election, there was some question as to whether *Bussey, Sr.*'s involvement with the Eastview project while serving in an elected position was improper. As a result, *Bussey, Sr.* withdrew from the development company and was replaced by Petitioner.

After receiving the HUD Mortgage insurance commitment, Thomas found an outside investor for the Eastview project, one J&B Management Company (J&B). On April 1, 1981, Petitioner, Thomas and J&B formed the Eastview Terrace Limited Partnership (partnership), whose purpose was to build and develop the apartment complex. Petitioner and Thomas were the partnership's general partners; each had a one and one-half

percent interest in the Partnership's capital. J&B was a limited partner. Executed simultaneously with the partnership agreement was a Development Agreement (DA) between Petitioner, Thomas, the Partnership, and J&B. The DA provided that the partnership would pay the general partners a developer's fee for their services. This sum was to be paid in four annual installments (the guaranteed payments).

In connection with the partnership agreement, Petitioner and Thomas verbally agreed that any revenue the Partnership received would go to Petitioner's father, *Bussey, Sr.* and that Thomas would receive only a consulting fee and traveling expenses. Such fee and expenses totaled approximately $41,500 for the entire project. Petitioner and his father had agreed that the income would go to *Bussey, Sr.*, in that Petitioner had no interest in the project.

After the initial closing in 1981, J&B gave the Partnership a check for $174,084. The check was deposited in the Eastview Development bank account for which Thomas and Petitioner were the signatories. Pursuant to the DA, with instructions from the partnership attorney, two checks were written jointly to Petitioner and Thomas, representing the guaranteed payment, one for $90,000 and one for $84,084. Both men endorsed the checks and Petitioner redeposited them in the Eastview Development account.

Mario Toca, a Florida accountant selected by Limited Partner, J&B Management, prepared the Partnership's tax return for 1981. In conjunction with the information for return Form 1065, Toca completed Schedule K-1's for the partners listing each partner's share of the Partnership's income, credits, and deductions. The K-1's for Petitioner and Thomas listed the guaranteed payment as income, attributing $87,042 (half of the total payment) to each. When Thomas received the K-1, he noticed it was incorrect because he had agreed to be paid only his consultant fee and expenses. Therefore, he directed his accountant to contact

Toca and make the necessary correction. Neither Thomas' accountant nor Toca contacted Petitioner regarding this change. This 1981 K-1 was never amended by Toca. Unknown to Petitioner, Petitioner's K-1 was sent to *Bussey, Sr.*'s Little Rock address. Thomas had directed J&B Management's attorney (Sanders) to use *Bussey Sr.'s* address in the partnership documents drafted by Sanders this was also unknown to Petitioner. Petitioner received the 1981 K-1, which he did not read, but merely placed in the box in which he kept his financial records. Petitioner subsequently gave the full, complete and unaltered documents to his accountant, Irl Steiner, C.P.A. with a major national accounting firm.

In 1984, when Petitioner had his 1981 personal income tax return prepared, petitioner told the C.P.A., taxpreparer, Irl Steiner, that the income on the Parthership's 1981 K-1 was incorrect because the $87,042 attributed to him had actually gone to the Eastview Development Company, Inc. It is disputed whether Steiner ever informed Petitioner that if that was the case, the Partnership's return and the K-1's would have to be amended to agree with Petitioner's return. Steiner testified that he *might* have told Petitioner that, if the K-1 was not corrected, Petitioner would have to pay additional taxes, however he was unsure. Petitioner's K-1 from the Partnership also indicated a loss from the partnership. This loss, unlike the guaranteed payment, was improperly included by the C.P.A. tax preparer in Petitioner's return without making any provision for the income. Similarly, Thomas took a loss on his tax return but did not take the income.

Thomas supervised the closing, construction and financing. Thomas directed Petitioner to Dallas to meet with Sanders to receive the "second payment," which payment was brought back to Little Rock, where it was deposited into The Eastview Development Account.

During the period of time that Petitioner was involved in the Eastview transaction, Petitioner was beginning a law firm.

Petitioner spent the substantial majority of the money he had borrowed from a bank to finance the law office. It was agreed between the partners that the payments from one main client, Maxxam, would go to reimburse the petitioner for his initial outlays in getting the law office established.

Thomas instructed Petitioner in August, 1983 that, pursuant to the Eastview Development Agreement, a letter had to be written to request the third payment. Petitioner prepared the letter and sent it to Gene Sanders, the attorney for J&B Management. Copies of this letter were sent and shown to both Thomas and *Bussey, Sr.* Part of the third payment went to pay expenses of the project and the remaining balance went to *Bussey, Sr.*

In 1984, pursuant to Thomas' previous direction, Petitioner sent a similar letter to Sanders requesting the fourth payment. The fourth and final payment was made by check, mailed by Sanders to W. A. Thomas, and then given to Petitioner and delivered uncashed to *Bussey, Sr.*

The false statement to HUD is directly tied to the Eastview payments. The Petitioner submitted, on October 15, 1983, a HUD recertification form to Gershman Investment Company to continue interest rate subsidy on a Section 235 home that he was purchasing with FHA insurance. The Petitioner requested that the managing attorney in his office estimate the income that Petitioner would receive through 1983 and complete the form.

On Petitioner's recertification form dated October 15, 1983, the estimated income reflected is $22,800. The Petitioner's individual 1983 income tax return showed income *actually received* of $28,008, a difference of $5,208.

The 1983 law firm return on which this information was based was not available to Petitioner until November 26, 1984.

REASONS FOR GRANTING THE WRIT

First, and most importantly, the decision below is in *direct contradiction* to the holdings of the United States Supreme Court in *United States v. Spies*, 317 U.S. 492 (1943); *United States v. Abel*, 469 U.S. 45 (1984); *United States v. Cheek*, 111 S. Ct. 604 (1991); and *Washington v. Texas*, 388 U.S. 14 (1967). Also the decision is not uniform with the judicial interpretation of the element of "knowledge" in 18 U.S.C. Section 1001, 7203, 7206(1). The decision below is so devoid of evidentiary support as to render the conviction unconstitutional under the due process clauses of the Fifth and Sixth Amendments.

This Petition for Writ of Certiorari principally addresses the misapplication of the Government sponsored and judicially approved doctrine of deliberate ignorance. When the term "knowledge" is used by a legislature in defining a crime and the judiciary imposes the doctrine of deliberate ignorance on proof of the element knowledge, with no uniform standard for its application, the judiciary has reached broad varying and conflicting decisions. The law is unsettled as to what circumstances the doctrine's use is constitutionally permissible to prove guilt beyond a reasonable doubt. The lack of guidance by the Court on the constitutionally permissible application and use of the deliberate ignorance instruction has resulted in (1) inter- and (2) intra-circuit conflicts in the decisions on the Constitutionally and statutory permissible standards for the use of the deliberate ignorance instruction.

The historical development and the most exhaustive analysis of the doctrine of deliberate ignorance is chronicled in Ira P. Robbins law review article entitled *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 Journal of Criminal Law and Criminology, 196, 199,200.

> The more recent use of the deliberate-ignorance question gained new prominence in the 1970s as the result of federal

narcotics prosecutions. In response to rapidly increasing rates of drug use and addiction, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970.

The substantial majority of cases that have approved the use of the deliberate ignorance instruction and where the court has denied certiorari have involved activities that were inherently illegal; i.e., drug trafficking, illegal gambling, etc.

In the present case, the Government has elevated the use of the deliberate ignorance instruction, to felony tax cases. Tax cases in which there was absolutely no proof or even allegation that the underlying transaction (Eastview) was illegal. The *Jewell* instruction takes away the primary fact questions from the jury of whether or not the Petitioner had "actual knowledge" of the tax consequences of this legal transaction.

The Court should review the use of the deliberate ignorance instruction in felony tax prosecution cases because it has national significance. The denial of certiorari on the facts in the present cases where (1) there was no proof of an affirmative-act conduct, (2) no proof of acts that petitioner purposely contrived to be deliberately ignorant to violate the statutes with which the Petitioner was charged and (3) no underlying illegal transaction; will signal to the Government, the approval of the use of the deliberate ignorance instruction as a substitute for proof of actual knowledge.

There was no evidence presented by the Government tending to show any willfulness, or *mens rea* on his part to commit the crimes charged. But even so, the trial court did not grant Petitioner a motion for acquittal. Further, the trial court permitted the giving of the *"Jewell"* or "Ostrich" instruction to the jury, which in effect permitted the jury to return a verdict of guilty based upon a negligence standard. Petitioner was not permitted by the trial court to introduce evidence of a "lack of willfulness" on his part, through the misapplication of Federal

608(b). This ruling also was in direct contradiction to *United States v. Abel*, 469 U.S. 45, 105 S Ct. 465 (1984). These errors served to violate Petitioner's Fifth and Sixth Amendment Constitutional Rights to a fair trial. Petitioner's appeal of the verdict and his petition for a rehearing, to the Eighth Circuit were denied.

The subject matter of Petitioner's conviction of felony tax violations, is a subject that all United States citizens could possibly encounter. The issues of (1) the interpretation of certain Federal Rules of Criminal Procedure, and (2) the giving of the *Jewell* instruction to the jury by the trial court, are issues that are unsettled and in total disarray. The conflicting issues among the circuits are, what is the constitutionally permissible language to be used in the *Jewell* instruction and under what the trial circumstances the *Jewell* instruction should or should not be given. The conflicts among the federal circuit courts of appeals must be settled in order that there will be uniformity among and within the circuits as to the standards required for federal felony tax convictions. As will be shown in the Writ, said issues arise with great frequency, and the Supreme Court of the United States should grant certiorari and issue its decision.

This case presents another important and related federal statutory issue; the interpretation and application of the term "knowingly" in 18 U.S.C. § 1001, the term "willfulness" in 18 U.S.C. § 1001 and 26 U.S.C. §§ 7203 and 7206, and the level of proof required to secure a felony conviction.

I

"Willfulness," as defined in tax statutes, means the intentional violation of a *known*, legal duty. *United States v. Bishop*, 412 U.S. 346, 360 (1973). The "known" in that definition connotes "actual knowledge" in "specific intent" crimes; *See Cheek v. United States*, 111 S. Ct. 604 (1991) at 610, 611. Petitioner argues that this requirement cannot be satisfied by a "deliberate ignorance" instruction, because that instruction reduces the mental state required by law to satisfy a felony tax conviction,

especially where there was no affirmative-act conduct as required by *Spies v. United States*, 317 U.S. 492, 63 S. Ct. 364 (1943) and its progeny.

A key indication of the Eighth Circuit's misapprehension of the definition of willfulness throughout the Tax Code is found in its Opinion at pages 1251-52.[1] Hornbook law should not apply to felony tax crimes.[2]

Another example of the Eighth's Circuit's misapprehension of the term willfulness as used in felony tax crimes is found at pages 1249 and 1250 of its opinion, at which the Court distinguishes *Mattingly* from present case.

The Eighth Circuit appears to ignore the substance of both *Bishop* and *Cheek* in its opinion. Both cases define willfulness in all of the Tax Code as the "intentional violation of a *known* legal duty." Based upon these cases, the more stringent term "knows" is included in the definition of willfulness as defined in the Tax Code.

As Robbins' article applies to the present case, Professor Robbins states:

> The central legal question raised by this approach [use of *Jewell* Instruction] is whether conviction based on deliberate-ignorance, or "Ostrich," jury instruction is compatible with the constitutional requirement that the prosecution prove each element of the crime, including knowledge beyond a reasonable doubt. The corresponding philosophical question is whether knowledge of a fact can exist in the

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[1] *United States v. Bussey*, 942 F.2d 1241 (8th Cir. 1991).

[2] The Eighth Circuit opinion in this case cites no facts that would support these conclusive statements, beyond a reasonable doubt, that the Petitioner "knew" and "did not believe [the tax return] to be true and correct as to any material matter" at the time that Petitioner signed the return. This is supposed to be the basis of the charged conduct.

> absence of subjective certainty or objective confirmation. These questions implicate both the relationship between the individual and the state and the relationship between the judiciary and the legislature. If neither question can be answered in the affirmative, then a conviction that is obtained would violate the defendant's constitutional rights because the state had not met its burden of proving knowledge. Furthermore, if the judiciary substitutes a lesser mental state for statutorily prescribed knowledge, then it encroaches on the legislative prerogative of defining criminal conduct." Robbins, *id.* at p. 194-95 (Footnote omitted).

The trial court's decision to give the *Jewell* instruction over the objection of the Petitioner, and the Court of Appeals affirmation of that decision, were in direct contradiction to the "specific intent" standards statutorily prescribed in 18 U.S.C. 1001, 26 U.S.C. 7203, and 26 U.S.C. 7206(1). Further, the decision is in contradiction to this Court's interpretation of those statutes on the elements of willfulness and knowledge.

For over forty years, beginning with *Spies v. United States*, 317 U.S. 492, 63 S. Ct. 364 (1943), the standard of willfulness for tax offenses has been clarified, defined and reviewed by this Court. The standard of willfulness in felony criminal tax offenses was ultimately defined in *United States v. Bishop*, 412 U.S. 346, 93 S. Ct. 2008 (1973) and most recently affirmed in *Cheek v. United States*, 111 S. Ct. 604 (1991).

The trial court, by giving the *Jewell* instruction in this trial, allowed the specific intent element of willfulness to be proven by a "knew or should have known," i.e., negligence standard. This also reduced the level of proof of knowledge in felony tax crimes required to be far less than the constitutionally required "beyond a reasonable doubt" standard. *See generally* Robbins, *supra*, constitutionally required at p. 227-31 (discussing risk of conviction for negligence when *Jewell* instruction is used).

The proliferation of our federal tax laws are more than "difficult". See *Cheek*, 111 S. Ct. 604, 609, the ever changing tax laws, in most cases, require one's hiring of a professional tax accountant for assistance and guidance regarding compliance with those tax laws. The requirement to pay federal taxes is nationwide. All taxpayers must be subjected to uniform federal penalties and standards for conviction, if criminal charges for failure to pay federal taxes are brought against them.

The lower courts are in such disarray over the standards of determining when to give the *Jewell* instruction that the Court should grant certiorari in the case at bar in order to provide guidance and eliminate a major source of confusion. The conflict among the federal circuit courts of appeal must be settled in order that there will be uniformity as to the standards required for federal felony tax convictions. As discussed above, this issue arises frequently.

The United States Court of Appeals for the Eighth Circuit erred in rejecting Petitioner's analogy of this case to the Court's decision in *Cheek*. Petitioner, pursuant to a Rule 28(g) motion, filed a brief calling the Court of Appeals' attention to this Court's decision in *Cheek*. *See* Appendix C, A-29-36.

In *Cheek*, the prosecution urged, and the trial court gave, a jury instruction that the defendant's belief must be "objectively reasonable," 111 S. Ct. at 611. The giving of the reasonable-objective standard instruction was a clear signal to the jury that they might depart from the statutory standard for and definition of willfulness and its specific-intent standard, thereby reducing the standard of proof required. The ruling in *Cheek* was that such was clearly unacceptable. *Id.* at 611-613.

The principle question raised by this appeal is whether a trial court abuses its discretion and violates an accused's Fifth and Sixth Amendment constitutional rights to a fair trial when the *Jewell* instruction was given to the jury and one of the elements of proof requires actual knowledge. Is the giving of such an

instruction compatible with the constitutional requirement that the prosecution prove each element of the crime, including actual *knowledge*, beyond a reasonable doubt? Petitioner submits that the giving of such an instruction departs from the statutory standard for proof of willfulness in felony tax crimes. It also departs from the prior decision of the U. S. Supreme Court, and decisions of the other federal courts. By permitting the *Jewell* instruction to be given, the judiciary substitutes a lessor mental state for the statutorily prescribed element of "knowledge", thereby encroaching on the legislative prerogative of defining criminal conduct.[3]

In *United States v. de Francisco-Lopez*, 939 F.2d 1405 (10th Cir. 1991), the United States Court of Appeals for the Tenth Circuit dealt with the question of whether the jury could properly infer beyond a reasonable doubt that the defendant had actual knowledge that he was transporting a large amount of cocaine with intent to distribute. The Court held that the jury should not have been instructed concerning deliberate ignorance of an operative fact in the absence of sufficiently probative evidence of the element of deliberation, and ruled that submission of the deliberate-ignorance instruction constituted reversible error.

The Tenth Circuit, as follows, went on to cite other circuits that supported the Tenth Circuit's position and Petitioner's argument regarding the risk of a conviction for mere negligence.

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[3] Cf. *U. S. v. 1977 Proshe*, Carrera, 911 VIN 911720, 1924, License No. 459 DWR, 748 FS 1180, (W.D. Tex 1990), Where in the Congress has specifically approved the giving of willful blindness type instructions in civil forfeiture cases under the *Comprehensive Drug Abuse Prevention and Control Act, 1970* Section 511, 21 USC Section 881. The United States District Court for Western District of Texas has stated that it is appropriate to give the instruction in this instance because the forfeiture is based on the use of property in transactions that are "inherently illegal" and in which the accused is more probable than not, likely to know that the activity is inherently illegal. More importantly, the Congress has specifically and statutorily approved its use.

The *de Francisco-Lopez* court went on to caution that courts must also studiously guard against the *danger of shifting the burden of proof* to the defendant to prove his or her innocence. 939 F.2d at 1411.

In *United States v. Giovannetti*, 919 F.2d 1223 (7th Cir. 1990) (per Posner, J.) *petition for rehearing denied*, 928 F.2d 225 (7th Cir. 1991), the United States Court of Appeals for the Seventh Circuit held that the use of a deliberate-ignorance instruction was inappropriate on the facts of the case (which involved convictions arising from an illegal gambling enterprise). In its decision, the Court wrote:

> The most powerful criticism of the Ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent. 919 F.2d at 1228.

The court in *Giovannetti, supra,* further stated:

> The Ostrich instruction is designed for cases in which there is evidence that the defendant, knowingly or strongly suspecting that he is involved in shady dealings takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings. 919 F.2d at 1228,[4] and:
>
> As we said in *United States v. Bigelow*, 919 F.2d at 966, 971 (7th Cir. 1990), when the facts require the jury to make a 'binary choice' between actual knowledge and 'complete innocence,' the Ostrich instruction should not be given. 919 F.2d at 1228.

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[4] There are no facts or circumstances cited in the Eighth Circuit's opinion of evidence presented at trial that Petitioner knew or strongly suspected that he was involved in any type of unlawful conduct, or took any steps to insure that he did not acquire full knowledge as regarding his tax situation. There are however numerous conclusory statements.

Using the binary concept, if the Government was trying to prove evidence of "actual knowledge" then the *Jewell* instruction should *not* have been given in the present case. If the Government was attempting to prove that the Petitioner purposely contrived" to avoid knowledge, then the facts of the case as well as theEighth Circuit's opinion on the evidence that the Petitioner "purposely contrived" are speculations.

In the case of bar, Petitioner submits that the facts of his case would have required the jury to make a binary choice between actual knowledge and complete innocence. There was no proof of actual knowledge shown at trial, as partly evidenced by the Eighth Circuit Court of Appeals in its decision (*Bussey supra)* repeatedly referring to what the Petitioner omitted to do. Simple justice requires the Petitioner to have been informed as to what affirmative act to commit a felony tax crime that the Court deemed there to have been sufficient evidence of, to support a conviction of felony tax crimes beyond a reasonable doubt. Clearly, the Eighth Circuit's decision reflects that it could not find those examples of affirmative act conduct, or actual knowledge, in the record. There being no such "actual knowledge," the giving of the *Jewell* instruction should not have been given to substitute for that lack of *mens rea.*

In *United States v. Sanchez-Robbes*, 927 F.2d 1070 (9th Cir. 1991), the United States Court of Appeals for the Ninth Circuit reversed a drug conviction, holding, *inter alia*, that the trial court had improperly given a deliberate-ignorance instruction. Here, too, the court focused on the risk of a conviction for negligence, 927 F.2d at 1073. The court then neatly summarized the Ninth Circuit *Jewell* cases as follows:

> Our cases upholding a *Jewell* instruction involved facts and circumstances creating a high probability of criminal activity that the defendant then ignored. In our cases disallowing a *Jewell* instruction, there were no suspicious circumstances surrounding the activity beyond the direct evidence

> of the illegality itself, which goes only to actual knowledge. 927 F.2d at 1073.

The Court further stated that:

> [A] *Jewell* instruction is not appropriate where the only evidence alerting a defendant to the high probability of criminal activity is *direct evidence of the illegality itself.* 927 F.2d at 1074. (emphasis added)

As it applies to the present case a showing of "actual knowledge" would require more than a showing that Petitioner signed the tax returns. It would require that the Government prove affirmative acts that Petitioner either had actual knowledge or performed some affirmative act to avoid knowledge.

The United States Court of Appeals for the Eleventh Circuit has also had occasion to address the issue of the giving of the *Jewell* instruction. In *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991), that Court found the giving of said instruction to have been a harmless error in the case before it because of other factors. But in its October 22, 1991 decision, the *Rivera* Court stated:

> The danger of overly liberal use of such an instruction in an inappropriate case is that juries will convict on a basis akin to a standard of negligence: that the defendant *should* have known that the conduct was illegal. Thus, the important safeguard of the law that a criminal defendant must be shown to have had knowledge of culpable behavior, *subjectively viewed*, may be watered down in those cases in which a deliberate ignorance instruction is incongruous with the facts of a crime. 944 F.2d at 1570-71 (emphasis in original; footnotes omitted).

Like other courts that are critical of the *Jewell* instruction, the Eleventh Circuit panel cited, now United States Supreme Court Justice Kennedy's dissent in *Jewell*. *See Rivera, supra,* at 1571

n. 30. And significantly, the Court wrote the following:

> . . . . By granting the required instruction on deliberate ignorance, the district court failed to restrain an overzealous prosecutor from putting forth an alternate theory of *mens rea* that was not supported by the evidence. 944 F.2d at 1572, 1573 (emphasis in original).

The Eighth Circuit's citation to *Rothrock* in its opinion, Appendix A p. A-20 is an example of the First and Eighth Circuits expanding view and willingness to shift the burden of proof to defendants. Citing *Rothrock*, the Eighth Circuit stated:

> As the First Circuit has observed: The purpose of the willful blindness theory is to impose criminal liability on people who, recognizing the likelihood of wrongdoing nonetheless consciously refuse to take basic investigatory steps. *United States v. Rothrock*, 806 F.2d 318, 323 (1st Cir. 1986).

With this view, the additional legal requirement is placed on defendants to take some undefined "basic investigatory steps" in order to avoid criminal liability, thereby, unconstitutionally shifting the burden to the defendant.[5]

In reaching this conclusion, the Eighth Circuit ignores the uncontroverted testimony of the accountants hired by Thomas and J&B Management, that they changed the Eastview Partnership tax returns without verification with Bussey or bringing any of those matters to Bussey's attention. See Appendix D, p. A-42.

Another indication of the Eighth Circuit's willingness to shift the burden of proof is at Appendix A, A-11. The opinion offers as proof of guilt, that burden is on the accused to provide a

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[5] The Eighth Circuit fails to recognize that notwithstanding the First Circuit's statement in *Rothrock*. The First Circuit achieved justice for the Rothrock's in a convoluted manner while still supporting a faulty doctrine of deliberate ignorance, remanded the case for a new trial. 806 F.2d 323.

rational basis for conduct, rather than reviewing the Government's burden of proof and facts the Government did or did not prove.

The deliberate ignorance is a judicially created doctrine for which there must be judicial guidance and restraint. In the current state, there are no guidelines from the Court and there is no restraint among the Circuits in using it in tax cases. This Court in *Cheeks*, specifically has held that the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an *exception to the traditional rule*. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws. 111 U.S. 609.

Professor Robbins writes in his Article that if there is to be an Ostrich instruction, the better position is that the instruction must include language to the effect that "a defendant has knowledge of a certain fact only if he is aware of a high probability of its existence, unless he actually believes that it does not exist." Such a "high probability" provision would reduce the likelihood of conviction for mere consciousness of some wrongdoing rather than knowledge of the material facts. The "unless" clause would highlight the importance of the defendant's actual state of mind, thereby minimizing the risk that the high-probability language may well lead the jury to apply an objective standard.

In numerous cases, the United States Court of Appeals for the Second Circuit, for example, has emphasized the importance of both clauses. *See, e.g., United States v. Feroz*, 848 F.2d 359, 360 (2d Cir. 1988); *United States v. Shareef*, 714 F.2d 232, 233 (2d Cir. 1983); *United States v. Cano*, 702 F.2d 370, 371 (2d Cir. 1983); *United States v. Aulet*, 618 F.2d 182, 191 (2d Cir. 1980); *United States v. Morals*, 577 F.2d 769, 774 n. 4 (2d Cir. 1978); *United States v. Bright*, 517 F.2d 584, 587-88 (2d Cir. 1975).[6] In

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[6] *See also United States v. Ochoa-Fabian*, 935 F.2d 1139, 1142 (10th Cir. 1991), *cf. United States v. Farfan-Carreon*, 935 F.2d 678, 680-81 (5th Cir. 1991).

Feroz, supra, the Second Circuit was so adamant about the importance of these prosecutions that it ordered that copies of the *Feroz* opinion be issued to all United States Attorneys in the Circuit within ten days, and to all Assistant United States Attorneys in the Circuit engaged in criminal prosecutions within three weeks. *See* 848 F.2d at 361.

In *United States v. Hiland*, 909 F.2d 1114 (8th Cir. 1990), the Eighth Circuit Court of Appeals wrote:

> We reject [appellant's] assertion that [a deliberate-ignorance] instruction must specifically stated that a defendant has knowledge of a certain fact only if he is aware of a high probability of its existence, unless he actually believes that it does not exist. *Although the Second Circuit has taken this position, . . . our decisions have not required the inclusion of such language in a willful blindness instruction.* 909 F.2d at 1130 (emphasis added; citations omitted).

The above indicates a clear statement of circuit conflict, which conflict includes the Eighth Circuit, on a question of interpretation and application of federal statutes that goes to the very heart of the definition of *mens rea* and the safeguards of criminal defendants. The First Circuit has joined the Eighth Circuit in refusing to adopt the high probability language to be included in the deliberate ignorance instruction.

The First Circuit did not expressly reject the Ninth Circuit position, but refused to adopt the Ninth Circuit position in its line of case. See *U.S. v. Masse*, 816 F.2d 803, 812 (1st Cir. 1982); *U.S. v. Picciandra*, 899 F.2d 39, 46 (1st Cir. 1986); *U.S. v. Krowen*, 809 F.2d 144, 148 (1st Cir. 1987).

The First and the Eighth Circuits have taken positions in direct opposition to that taken by the Second, Fifth, Seventh, Ninth and Eleventh Circuits regarding the standards required for giving the deliberate ignorance instruction. Professor Robbin's has indi-

cated "that this doctrine is relatively new and in need of an analytical framework." Robbins, *supra*, p. 202 Footnote.

These are conflicts between the Circuits and within the Circuits regarding the *Jewell* instruction. The majority of the circuits have for more than fifteen (15) years interpreted its use without any guidance by the Supreme Court of the United States. The United States Supreme Court should intercede and give direction.

II

The results reached in this case flatly contradict the Supreme Court's often-cited unanimous decision in *Spies v. United States*, 317 U.S. 492, 63 S. Ct. 364 (1943). Evidence of the fact is not only found in the trial court record but also in the Court of Appeals' opinion. The Eighth Circuit repeatedly referred to what the Petitioner omitted to do, not what he did do. The trial record is devoid of any of the categories of affirmative acts cited in the non-exclusive listing of affirmative acts in *Spies*.

The Supreme Court unanimously reversed Spies' conviction. The Court held that, although a felony may *include* a misdemeanor, it would be hard to imagine that Congress intended the *identical* conduct to be punishable as both a misdemeanor and a felony; therefore, something more was intended in order for a mere failure to file a return or to pay tax to be punishable as tax evasion. The "something more" the Court held, was an affirmative action: "Some willful commission in addition to the willful omissions that make up the list misdemeanors." *Spies, id.* at 497-498.

The Petitioner's case is precisely like *Spies*. There was no evidence of any concealment of income or even the expenditure of money for personal gain or benefit or lifestyle compatible with the kind of money the Petitioner was reported to have received. The jury was instructed in a manner that it could convict solely on the basis of conduct constituting omissions, by use of the

Jewell instruction. With this "knew or should have known" standard, it is clear that the jury may have based its guilty verdict solely on Petitioner's omission.

But for prosecution witness Steiner's ambivalent testimony, which went unchallenged because of the trial court's Federal Rule of Evidence 608(b) ruling excluding Petitioner's proffered defense, there is no testimony in the trial court record that the Petitioner was even aware of the tax consequences of the Eastview transaction. See Argument III herein.

Notwithstanding the foregoing problems with proving the Petitioner's awareness, there was no testimony that the Petitioner committed any of the affirmative acts required in *Spies* to find felony conduct. The Court's opinion in *Bussey, supra*, 942 F.2d at 1248 demonstrates that Eighth Circuit refers to omissions.[7]

*The Government Failed to Prove that Petitioner **Purposely Contrived** to Deliberately Avoid Knowledge.* However, it is the doctrine's application to facts and statutes that is causing, chaos, disarray and confusion among the circuits, especially in tax cases. Consider that this court in *Cheek*, at p. 609, indicated the importance of proof of actual knowledge in felony tax cases.

The conflict in the application of the doctrine has several levels of confusion. First, each of the statutes the Petitioner was charged with violating, prescribe that in order to prove criminal conduct that the Government must prove "knowledge" beyond a reasonable doubt, in 18 USC 1001, 26 USC 7206(1) and 26 USC 7203.

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[7] *Comment.* What is absolutely baffling is how the Eighth Circuit could conclude that Bussey directed Steiner, a C.P.A., away from the transaction when Steiner had the original source document, the Eastview K-1. Steiner was the tax preparer and had superior knowledge regarding tax preparation. The Petitioner went to Steiner for assistance. Further there is no proof that Petitioner had tax preparation knowledge.

In tax cases this court has recognized a higher standard of knowledge required by the tax statutes because of the complexity and difficulty of tax laws.

Government has improved its trial strategy by requesting and getting the Ostrich instruction as well as an additional jury instruction on the element of "knowledge" which gives the jury the option of conviction on a negligent standard.

Some circuits have attempted to resolve this conflict by recognizing the binary concept of proof of "actual knowledge" and proof of deliberate ignorance are mutually inconsistent alternatives and therefore hold that the deliberate ignorance instruction should not be given if there is proof of actual knowledge. It is in this area that the concept gets confusing and that there is conflict among the circuits.

In a recent case, *United States v. Giovannetti*, 919 F.2d 1223 (7th Cir. 1990), petition for rehearing denied 928 F.2d 225 (7th Cir. 1991) (per Posner, J.) the Court stated:

> As we said in *United States v. Bigelow*, 914 F.2d 966, 971 (7th Cir. 1990), when the facts require the jury to make a 'binary choice' between 'actual knowledge' and 'complete innocence,' the Ostrich instruction should not be given. 919 F.2d at 1228.

Among other things, the court stated that "the most powerful criticism of the Ostrich instruction is precisely, that its tendency is to allow juries to convict upon a finding of negligence for crime that requires intent. 919 F.2d at 1228.

> The Ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings. 919 F.2d at 1228.

This last point emphasizes Petitioner's earlier point, that the approval of the Ostrich instruction is for cases where the underlying activity was inherently illegal or *shady dealing*. The Eastview transaction in this case was clearly legal. The use of deliberate ignorance in such circumstances represents a continuing expansion of doctrine, a doctrine that all circuits state, should be rarely used, but the statement is honored more in the breach, than its recognition.

The Government in the present case absolutely cannot meet the foregoing test. The Eighth Circuit in affirming the conviction in this case has determined that the *de Francisco-Lopez* standards do not have to be met.

Like the Tenth Circuit in *de Francisco-Lopez*, the Eleventh Circuit stated that "a district court should not instruct the jury on 'deliberate ignorance' when the relevant evidence points only to *actual knowledge*, rather than deliberate avoidance." 944 F.2d at 1571 (emphasis in original; footnote omitted).

The Eighth Circuit opinion points to numerous omissions of the Petitioner rather than affirmative-acts that would indicate direct or circumstantial evidence that the petitioner purposely contrived to deliberate ignorance. In fact, the omissions that the Eighth Circuit repeatedly cites, are as consistent with the Petitioner's defense that he was not aware of the facts, as they are with deliberate ignorance.

III

The trial court violated Petitioner's constitutional rights to a fair trial when it (trial court) refused, based upon Federal Rule of Evidence 608(b), to allow the Petitioner to introduce evidence of a lack of willfulness. Since *Washington v. Texas*, 388 U.S. 14, 17-19 (1967), this Court has emphasized the right of the accused to not only confront and challenge the testimony of prosecution witnesses, but also to present their own witnesses to establish a defense. "The defendant", stated the Chief Justice, "has just as

much right to present his or her version of the facts to the jury as the prosecution." *Id.* at 19.

In violating this constitutional principle, the Eighth Circuit misapprehended the intent and accepted application of Federal Rule of Evidence 608(b) as applied, and construed by the Supreme Court in *United States v. Abel*, 469 U.S. 45, 105 S. Ct. 465 (1984). The Eighth Circuit's opinion in the present case (See Appendix A-24) is in direct contradiction to the unanimous court ruling in *Abel, supra.*

Speaking directly to the Sixth Amendment right of an accused to present evidence of a lack of willfulness, this Court in *Cheek v. United States, supra*, at 611 (1991), stated that "forbidding a jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." The Eighth Circuit previously recognized this principle in dicta in *United States v. Parshall*, 757 F.2d 211, 213 (8th Cir. 1988).

There are two independent, equally fatal basis for the trial court's misapprehension and erroneous application of Federal Rule 608(b).[8] They are as follows:

1. That the evidence that the Petitioner sought to have its witness testify to, was *not* extrinsic.

2. That the Petitioner had every constitutional and legal

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[8] Federal Rule of Evidence 608(b) provides:

> Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as prided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness to which character the witness being cross-examined has testified.

> right to attack the credibility of the prosecution witness on specific instances of conduct directly relevant to charges against the Petitioner and the Government's witness's testimony.

The trial court based its decision on the opinion that Petitioner sought to attack a government witness (Steiner's) credibility by extrinsic evidence. See Appendix A, pg. A-24. There is absolutely nothing in the record that supports this conclusion.

Extrinsic evidence is defined by Blacks Law Dictionary, p. 529, (5th Ed. West 1979) as "external evidence, or that (evidence) which is not contained in the body of an agreement, contract, and the like. "Extrinsic evidence is also said to be evidence *not legitimately before the tribunal in which the determination is made.*"

Petitioner's counsel's offer of proof clearly shows that testimony proffered,related to Government Exhibit 71, page 17, which had already been admitted into evidence and was legitimately before the tribunal in which the determination was being made. (Appendix E, p. A-53). It cannot be deemed by definition to be extrinsic for the purpose of presenting a defense.

The Government moved to restrict and limit the testimony of Petitioner's expert, Stephen J. Conway (an attorney and C.P.A.) The court sustained the Government's objection to Petitioner's witness, Stephen Conway, on the basis of Federal Rule of Evidence 608(b). (See defense counsel's offer of proof, Appendix A, p. A-23.)

After said offer of proof, the court again refused to allow defense counsel to call Mr. Conway. The Eighth Circuit in its opinion, (Appendix A, p. A-24) opined that ". . . Bussey obviously sought to use Conway to attack Steiner's credibility." 942 F.2d at 1253. Petitioner had every constitutional right to attack Steiner's credibility with the government's own evidence and with petitioner's own witness.

Credibility is defined as "worthiness of belief", Blacks Law Dictionary, p. 330 (5th Ed., West 1979). The trial court based its ruling on Federal Rule 608(b) and the Eighth Circuit concluded that the trial court's ruling was correct. *Bussey, supra*, 942 F.2d at 1252-1253.

Steiner's credibility was an issue and should have been. Any witness who testifies has his credibility as a peripheral issue. The fact-related issue was whether Steiner actually told the Petitioner about the problem with the Eastview K-1. Steiner testified with uncertainty that he believed he would have told Petitioner just as he would have told most clients. Government Exhibit 71, page 17 directly contradicted Steiner's testimony. This exhibit is a checklist of items prepared by Steiner's reviewer for Steiner to complete. It can clearly be seen that five of the six items are initialed as complete. The Eastview item is not initialed as being completed. (See Appendix E, p. A-53) This was critical testimony attesting to the lack of awareness of the Petitioner and as a consequence, a lack of willfulness.

This Court, in its only review of Federal Rule of Evidence 608(b), in *United States v. Abel*, 469 U.S. 45, 105 S. Ct. 465 (1984), regarding proffered testimony, stated: "There is no rule of evidence which provided that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar." 469 U.S. at 46, 56.

The Eighth Circuit, in further ignoring this Court's holding in *Washington v. Texas, supra,* suggested at pages 1252 and 1253 of its opinion that Petitioner's cross-examination of Steiner was a sufficient opportunity for Petitioner to challenge a prosecution witness' statement.

This is an example of the Eighth Circuit's determination that this Petitioner was given sufficient opportunity to present his version of the facts, and that the issue of credibility was resolved against the Petitioner when the Petitioner had no opportunity to expose the Government witness's lack of credibility through the defense's own witness. Implicit in the Eighth Circuit's statement, is that a fair trial is achieved if there is only an opportunity for cross-examination. This statement seems to further imply that the Eighth Circuit is refusing to reach the evidentiary determination, because the district court properly applied Federal Rule of Evidence 608(b). Petitioner disagrees.

Federal Rule of Evidence 608(b) is far from being plain and clear. One legal scholar has substantially reviewed the various federal court's interpretations and applications of the Federal Rule of Evidence 608(b). That review was in the form of an article written by Professor Janeen Kerper entitled "*Federal Rule of Evidence 608(b): a Proposed Revision*", and published in the 22 *Akron Law Review* (1989). Petitioner relies substantially on this Article (hereinafter "Article"), draws considerably on the logic contained therein and utilizes the Article's analysis for a comparative analysis in this case. This Petitioner acknowledges and credits said Article's authors for the arguments raised by Petitioner relative to Federal Rule 608(b) herein.

Again, Federal Rule of Evidence 608(b) is far from being plain and clear. But, as as stated in the Article:

> Because the exclusion of extrinsic evidence is nondiscretionary, Rule 608(b) has become a powerful tool of strategy particularly in criminal cases . . . . Federal judges are confronted on a daily basis with attempts to exclude evidence on the grounds that it is extrinsic evidence of specific instances of conduct offered to show a witness's credibility. Because the problem rises with such frequency, it is critical that the applicable Rule be clear." Article, at 288.

Professor Kerper believes the major problem with Rule 608(b) to be with the use of the word "credibility" in its first sentence. As recognized in the Article, one's bias, prejudice, state of mind or perception can affect one's worthiness of belief. The Court is aware, specific instances of a witness's motive, bias, prejudice, state of mind and/or perception have always been proven by extrinsic evidence.

A defining reference to the term credibility in federal jury instructions, does not provide a more narrow and clear meaning of credibility.[9]

Federal Rule of Evidence 608(b) was not meant to prohibit such evidence. While the proffered testimony may very well have served to impeach the credibility of the government witness Steiner directly, it was evidence showing bias on the part of Steiner. As this Court ruled in *United States v. Abel, supra,* at p. 56, in ruling evidence of bias to be admissible under Rule 608(b),

> [I]t would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.

The most critical error on this issue of admissibility was the finding that the proffered evidence was extrinsic, and therefore inadmissible for all purposes under Rule 608(b). The proffered testimony related to Government Exhibit 71, page 17, a document already admitted into evidence. There was no legal or constitutional reason to deny Petitioner the right to attack the credibility of prosecution witness Steiner on the basis of specific instances of conduct and evidence already admitted, and on evidence directly related to the crimes charged.

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[9] Article, at 289, *citing* E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions*, sec. 17.01 at 519-520 (3rd ed. 1977).

This court should make the understanding of Rule 608(b) clear by recognizing that notwithstanding Rule 608(b), there are at least five major ways of impeaching or attacking the credibility of a witness. *See* generally, C. McCormick, *supra*, n. 8, at 72-73; G. Lilly, *supra*, note 28 at 279-280, to which Rule 608(b) *does not* apply. *See also* Article, *supra*, at 290. The Petitioner's proffered testimony clearly meets three of the methods of impeachment.

The first method of impeachment, i.e., contradiction, the record clearly shows that the document, Government Exhibit 71, page 17, was *internally inconsistent* with Government witness Steiner's present testimony. The Petitioner's proffered testimony would have shown that this process in accounting firms of "clearing the point" was not some trivial oversight but an accounting practice procedure with which accounting firms demand compliance.

The second method of impeachment is *contradiction* by others. Petitioner's proffered testimony by an experienced certified public accountant, who was also an attorney, would have shown that, if Steiner had not "cleared the point," in the accounting profession, he would have been deemed not to have performed the requirement of said point. In this case, Steiner would have been therefore deemed not to have made the Petitioner aware of the Eastview K-1 problem.

The third method of impeachment would have allowed the Petitioner to show that the witness was *biased* or *influenced* in the case by emotional considerations or matters of pecuniary interest. Petitioner had laid ample foundation on cross-examination of Steiner by having Steiner testify that that point regarding the amended K-1 had in fact not been cleared, and that in the event he had not told Petitioner of the need therefore, he might be guilty of malpractice. Thus, indicating his strong need to lie. Petitioner had to have his own witness to present his defense and to make the jury understand the significance of the contradiction

in Steiner's testimony as well as the significance of the foundation Petitioner had already laid on cross-examination.

With his expert witness Stephen J. Conway, Petitioner desired to show bias on the part of the Government witness Steiner in testifying as he did so. Petitioner's proffered evidence clearly shows that it was not generally accepted accounting procedures for an accountant tax preparer to not have cleared the point prior to signing the client's tax return. (See Appendix E, A-53)

In Petitioner's case, one point to be cleared was the necessity of obtaining amended Eastview K-1. Although five other points were listed and formally cleared by accountant Steiner, the point regarding the amended Eastview K-1 form, though listed, was never formally cleared. This fact is clear from the written evidence (Steiner's work papers). (See Appendix E, A-53) From the proffered evidence, Steiner would have clearly committed malpractice, if he had completed Petitioner's tax return without clearing that point. It would have been just as clear that Steiner was therefore bias, and for protection of his own interests would lie about Eastview amended K-1.

Chief Justice Rehnquist speaking for a unanimous court, stated in *Abel, supra*, 469 U.S. at 52, that "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess *all evidence* which might bear on the accuracy and truth of a witness's testimony." (Emphasis added)

Challenge to this government witness's testimony was critical to the Petitioner's defense because Steiner as a witness for the prosecution was the only witness who even remotely testified in the government case-in-chief to the alleged fact that the Petitioner might have been aware of the Eastview's problem. Even that testimony was tentative at best.

Federal Rule of Evidence 608(b), as interpreted in Petitioner's case, limited the ability of Petitioner to present an effective

defense regarding the issue of willfulness. The interpretation 608(b) was also contrary to the Courts rulings that an accused has a right to trial to present an effective defense. *See Washington v. Texas, supra.*

Federal Rule of Evidence 608(b) is a rule of evidence that is used daily in criminal cases. Its mistaken and narrow interpretation can have an unconstitutional affect upon an accused's constitutional rights to a fair trial. There is no legislative history of note to provide guidance. The Rule 608(b) needs to be made clear and uniform, not only between the federal circuits but between the lower courts within the circuits. This Court should grant Petitioner's request for certiorari, and make the interpretation of this most important and "far-reaching" Federal Rule 608(b) clear and uniform and bring the Eighth Circuit's interpretation in line with the Court's holding in *Abel.*

CONCLUSION

The Court should grant Certiorari in this case (1) to resolve the confusion and disarray among the circuits regarding the standards, circumstances and language constitutionally permissible when charging a jury with the *Jewell* instruction, and (2) to bring the Eighth Circuit's decisions into conformance with the judicial precedents of this Court regarding an accused's right to present an effective defense and prove a lack of willfulness, in felony tax prosecutions, when there is no affirmative act conduct.

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 90-2112EM

United States of America,
Appellee,

v.

Charles L. Bussey, Jr.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: March 14, 1991
Filed: August 20, 1991

Before McMILLIAN and MAGILL, Circuit Judges, and WOODS,* District Judge.

MAGILL, Circuit Judge.

Charles L. Bussey, Jr., appeals his conviction for filing false tax returns for the years 1981, 1983 and 1984, in violation of 26 U.S.C. § 7206(1); failing to file a tax return for 1982, in violation of 26 U.S.C. § 7203; and filing a false statement with the Department of Housing and Urban Development, in violation of 18 U.S.C. § 1001. Bussey argues that the district court[1] erred in giving a "willful blindness" instruction because such an instruction was not warranted by the evidence; in failing to grant his

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*THE HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

[1]The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

motion for acquittal on the ground that the evidence was insufficient to convict him; in excluding certain testimony under Fed. R. Evid. 608(b); and in refusing to grant him a new trial on the ground of prosecutorial misconduct. We affirm.

I.

A. Background

In 1977, Bussey's father, Charles Bussey, Sr. (Bussey, Sr.), who resided in Little Rock, Arkansas, contacted his St. Louis-based son about a potential real estate development project in Little Rock. Because Bussey did not have much experience in such matters, he in turn contacted his friend and former employer, William A. Thomas, an experienced real estate appraiser, developer, and consultant, for assistance. In 1978, Thomas suggested that Bussey, a practicing lawyer, form Eastview Development Company, Inc., to build an apartment complex on the Little Rock property. Bussey Sr. and two of his friends were the sole shareholders and officers of the corporation.

To finance the project, Thomas and Bussey sought a Department of Housing and Urban Development (HUD)-insured mortgage in 1980. That same year Bussey Sr. was elected to the Little Rock city council. After the election, there was some question as to whether Bussey Sr.'s involvement with the Eastview project while serving in an elected position was improper. As a result, Bussey Sr. withdrew from the development company and was replaced by his son. Work continued on the project, with Bussey and Thomas eventually obtaining an option to purchase the Little Rock property.

After receiving the HUD mortgage insurance commitment, Thomas found an outside investor for the Eastview project, J & B Management Company (J&B). On April 1, 1987, Bussey, Thomas and J&B formed the Eastview Terrace Limited Partnership (Partnership), whose purpose was to build and develop the

apartment complex. Supp. App. 9, at 2. Bussey and Thomas were the Partnership's sole general partners; each had a one and a half percent interest in the Partnership's capital. J&B was a limited partner. Executed simultaneously with the partnership agreement was a Development Agreement (DA) between Bussey, Thomas, the Partnership, and J&B. *See* Supp. App. 10, at 1. The DA provided that the Partnership would pay the general partners a developer's fee for their services. *Id.* at 15. This sum was to be paid in four annual installments (the guaranteed payments). 2 Tr. at 60. Each installment payment was split in two parts for tax purposes. *Id.* at 65.

In connection with the partnership agreement, Bussey and Thomas verbally agreed that any revenue the Partnership received would go to Bussey and that Thomas would receive only a consulting fee and traveling expenses. These totaled approximately $41,500 for the entire project. 2 Tr. at 49. Bussey and his father agreed that Bussey would pass on part of the payments to Bussey Sr. 8 Tr. at 86-88.

After the initial closing in 1981, J&B gave the Partnership a check for $174,084. The check was deposited in a Little Rock bank account for which Thomas and Bussey were the signatories. Pursuant to the DA, Bussey wrote two checks to himself and Thomas, one for $90,000 and one for $84,084, representing the guaranteed payment. Both men endorsed the checks and Bussey redeposited them in the Little Rock account.

Mario Toca, a Florida accountant, prepared the Partnership's tax return for 1981. In conjunction with the information return Form 1065, he filled out Schedule K-1s for the partners, which listed each partner's share of the Partnership's income, credits, and deductions.[2] The K-1s for Bussey and Thomas listed the

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[2] Generally, partnerships do not pay income tax. Rather, the individual partners are liable for tax on their shares of the partnership income. Therefore,

(Footnote 2 continued next page)

guaranteed payment as income, attributing $87,042 (half of the total payment) to each. Under 11 U.S.C. § 707(c), such guaranteed payments were gross income to Bussey and Thomas and were to be reported on Schedule E of their Form 1040 income tax returns. When Thomas received the K-1, he noticed it was incorrect, because he had agreed to be paid only his consultant fee and expenses. Therefore, he directed his accountants to contact Toca and make the necessary correction.[3] Bussey's K-1 was sent to Bussey Sr.'s Little Rock address, which Bussey had used in the partnership documents. Bussey nevertheless received the K-1, which he did not read, but merely placed in the box in which he kept his financial records. 7 Tr. at 230.

Bussey never reported the 1981 guaranteed payment as income. In 1984, when Bussey had his 1981 personal income tax return prepared, Bussey told the preparer, Irl Steiner, that the Partnership's 1981 K-1, which Steiner had found in Bussey's box, was incorrect because the $87,042 attributed to him had actually gone to the Eastview Development Company, Inc. 3 Tr. at 185.[4] Steiner informed Bussey that if that was the case, the Partnership's return and the K-1s would have to be amended to agree with Bussey's return. Steiner also told Bussey that if the K-1 was not corrected, Bussey would have to pay additional

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(Footnote 2 Continued)

a partnership files a return, Form 1065, only for information purposes. Form 1065 states the partnership's gross income, credits, deductions, and the like, for the taxable year. Schedule K to Form 1065 is a summary schedule that lists all of the partners' shares of the partnership's income, credits, and deductions. Schedule K-1 shows each partner's individual share. A partnership must include copies of all K-1s with its 1065 return, as well as provide each partner with a copy of his or her K-1.

[3] Thomas received no more K-1s from the Partnership.

[4] The development company, however, had ceased to exist in the summer of 1981.

taxes. *Id.* at 188. Bussey's K-1 from the Partnership also indicated a loss from the Partnership. This loss, unlike the guaranteed payment, was included in Bussey's return.

B. 1982 Return

Bussey traveled to Dallas in 1982 to pick up the second $174,084 installment payment from J&B's lawyer. This payment was deposited in the Partnership's account. Bussey then drafted two checks in the amount of $90,000 and $84,084, endorsed them, signing Thomas' name as well as his own, and redeposited them in the Partnership's account. 2 Tr. at 124.

In 1982 Bussey also worked for Maxxam Consulting Group, managing a minority business development agency contract for Maxxam in St. Louis. For his management services, Maxxam paid Bussey $18,000 that year. 3 Tr. at 260.

Bussey never filed an income tax return for 1982.

C. 1983 and 1984 Return

In 1983, Bussey again traveled to Dallas to pick up the $174,084 payment. Bussey gave this check to his father, who deposited it in Bussey Sr.'s personal checking account. Of these funds, $33,000 was used to pay off Bussey's loans. 6 Tr. at 160. The final payment, for $131,292, was sent to Thomas in 1984. Thomas gave it to Bussey, who deposited the check in the Partnership's account, and then wrote two checks on the account, one to his father for $75,000 and one to Eastview's building for $55,000.

Bussey also omitted any reference to the guaranteed payments in his 1983 and 1984 returns. His tax preparer for those years, Angela Evans, had given Bussey tax organizers to facilitate the preparation of the returns. These organizers specifically requested any information concerning partnerships. Bussey did

not mention the guaranteed payments in the organizers. He also did not show Evans the Partnership's K-1s and did not inform her of any tax consequences to the Partnership. 3 Tr. at 325.

D. False Statement to HUD

Bussey was a beneficiary of the federal government's program to assist low and moderate income families in the purchase of a house. Bussey applied for a HUD subsidy in 1982. The program he applied to required that to be eligible for the subsidy, an applicant had to sell any real estate she or he owned, report all sources of income, and list all assets. 5 Tr. at 158. On his application he listed his employment as the manager of a good service company, Midwest Host, Inc., in which he held an interest. He listed his salary as $22,000 a year. He listed no other sources of income. 5 Tr. at 180. The only bank account he listed was his personal account. Bussey also listed a house as an asset, with the notation that the house was to be sold. Bussey did not list among his assets his interest in the Partnership, his ownership interest in a number of small businesses, his partnership interest in a law firm he had founded in 1981, Bussey & Jordan, or his ownership of a 1982 Datsun 280Z car. As regards sources of income, Bussey did not list the guaranteed payments from the Partnership or his income from Bussey & Jordan. Based on the information he provided, HUD found that Bussey qualified for the subsidy.

In October 1983, Bussey sought to get his subsidy recertified. In his recertification papers, Bussey indicated that his current income was $22,800, *see* 5 Tr. at 210, but he failed to report to HUD the $174,084 guaranteed payment from the Partnership or income he received from Maxxam.

E. Procedural History

In 1990, Bussey was charged with filing false income tax returns for the years 1981, 1983 and 1984, in violation of 26 U.S.C. § 7206(1)[5]; with failing to file an income tax return for 1982 and 1985, in violation of 26 U.S.C. § 7203[6]; and with making a false statement to HUD, in violation of 18 U.S.C. § 1001.[7] Following a two-week jury trial, Bussey was convicted on all counts except the failure to file a return in 1985. The district court sentenced Bussey to three years' imprisonment on each income tax count and one year on the false statement count, with all sentences to run concurrently. The district court also ordered Bussey to repay the $7,883 housing subsidy he received

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[5] 26 U.S.C. § 7206(1) provides:

> [Any person who] [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 . . . or imprisoned not more than three years, or both, together with the costs of prosecution.

[6] 26 U.S.C. § 7203 provides:

> Any person . . . required by this title or by regulations made under authority thereof to make a return . . . who willfully fails to . . . make such return . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 . . . or imprisoned not more than 1 year, or both, together with the costs of prosecution.

[7] 18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

as a result of his false statement to HUD, and to pay a $150 assessment as well as the costs of the prosecution. Bussey now appeals his conviction to this court.

II.

A. The Willful Blindness Instruction

Bussey's primary argument on appeal is that the district court erred in giving a willful blindness instruction. The instruction permitted the jury to find that Bussey had the requisite intent to commit the crimes if it determined that he had deliberately avoided knowledge of the facts that made his conduct illegal. The instruction read:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact.
>
> It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Instruction 37, App. 1. Bussey argues that the willful blindness instruction, also known as the *Jewell*, *see United States v. Jewell*, 532 F.2d 697 (9th Cir.), (en banc), *cert. denied*, 426 U.S. 951 (1976), or "ostrich" instruction, *see United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir.), *cert. denied sub nom. McCreary v. United States*, 476 U.S. 1186 (1986), was not justified because

there was no evidence that he purposely sought to avoid any knowledge.[8]

This court has specifically approved the use of the willful blindness instruction in tax fraud cases. *See United States v. Zimmerman*, 832 F.2d 454, 458 (8th Cir. 1987) (per curiam). As we observed in *United States v. Hiland*, 909 F.2d 1114 (8th Cir. 1990), the willful blindness instruction "allows the jury to impute knowledge to [the defendant] of what should be obvious to him, if it found, beyond a reasonable doubt, a conscious purpose to avoid enlightenment." *Id.* at 1130 (quotation omitted). *See also United States v. Mattingly*, 924 F.2d 785, 792 (8th Cir. 1991) ("[T]he element of knowledge may be inferred from deliberate acts amounting to willful blindness to the existence of fact or acts amounting to willful blindness to the existence of fact or acts constituting conscious purpose to avoid enlightenment."). In reviewing a district court's decision to give a willful blindness instruction, we must review the evidence and any reasonable inference from that evidence in the light most favorable to the government." *Hiland*, 909 F.2d at 1131.

1. The § 7206 Convictions

The jury found Bussey guilty of willfully filing false income tax returns for the years 1981, 1983 and 1984. Viewing the evidence in the light most favorable to the government, we believe the district court did not err in submitting a willful blindness instruction to the jury on these charges. Although there is a great deal of evidence supporting the submission of the instruction, we will focus on only one transaction, the guaranteed payments Bussey received in connection with the Eastview

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[8] Bussey also argues that the instruction permitted the jury to find him guilty based on simple negligence. *See* Bussey's Brief at 19. Because the instruction expressly informed the jury that negligence or mistake did not constitute willfulness or knowledge, this contention is without merit.

project. As an initial matter, we note that Bussey testified at trial that he never read the partnership contract or the DA, or his tax returns for that matter: "Q. And among the documents you did not read include all of these Eastview closing documents, your own tax returns, did not read those. Is that what you're telling the jury? A. Yes, it is." 8 Tr. at 219.

As regards his 1981 tax return, Bussey did not report the Eastview guaranteed payment, even though he knew he had earned and received it:

> Q. At that point in time [1981], with your understanding with Mr. Thomas he was only to receive $41,500 out of those monies, at that point in time, the rest of the money was yours. It was received by you, and it was earned by you at that point in time, wasn't it?
>
> A. Yes.

8 Tr. at 92. Even though Bussey knew he had received the guaranteed payment, in 1984 he told Steiner that it was not his income because it had been paid to the development corporation that had preceded the Partnership:

> Q. And you told [Steiner] that all the money had been paid to the corporation?
>
> A. Well, based on the conversation that he said to me, yes, I did say that.
>
> Q. And, in fact all of the money had not been paid to the corporation, had it? The money had been paid to Charles Bussey, Jr. and William A. Thomas, hadn't it?
>
> A. You're raising a very technical—yes, yes.
>
> Q. Is that where the money was paid?
>
> A. Yes, yes.

8 Tr. at 160. At trial, Bussey was asked about his belief that the Partnership was transferring funds to the development company:

> Q. Now, it's your understanding that there was still a development company in operation, and also a partnership?
>
> A. Yes.
>
> Q. Did you make any distinction between the two of them?
>
> A. Well, what I thought was happening, because W. A. Thomas was taking care of the accounting, I thought W. A. Thomas was taking care of the accounting.
>
> . . . .
>
> Q. Were you involved in any way with the books and records for [the Partnership]?
>
> A. No. I thought Bill Thomas was taking care of it. He had selected [an accountant]. I thought [the accountant] was taking care of all of those things . . . .

7 Tr. at 233-34. On cross-examination, the government asked Bussey why he believed that Thomas was taking care of everything:

> Q. Mr. Bussey, in 1981, what was your rational basis for believing that Mr. Thomas had these bank records from which he could conduct these analyses that you were depending on him to do?
>
> A. I don't know how to answer the question.
>
> Q. You didn't have one did you?
>
> A. I don't know how to answer the question.

8 Tr. at 111.

The evidence also showed that Steiner, after receiving the 1981 K-1, told Bussey that he should contact the Partnership and that the Partnership's 1065 return and the K-1s should be amended to reflect that the guaranteed payments were going to a corporation. 3 Tr. at 187.[9] Bussey never did this. Nor did Bussey every inform Steiner that he had an agreement with his father to pass on the guaranteed payments. 8 Tr. at 160. Furthermore, Bussey never asked Steiner or Toca about how to treat the partnership income, even though he did not know what a K-1 was or what it meant, 7 Tr. at 230, and he did not understand anything about partnership taxation. 8 Tr. at 25. Bussey's testimony at trial is illuminating:

> Q. Did you believe . . . that you could make money as a general partnership, and pass it on to someone else, and not have to report it yourself?
>
> A. . . . I didn't think about the question.
>
> Q. Didn't look into it either?
>
> A. I did not.

8 Tr. at 95. Although Bussey was under no legal duty to contact any accountant or tax expert, his decision not to do so constitutes at least some evidence of deliberate ignorance. *See Hiland*, 909 F.2d at 1131.

With respect to the 1983 and 1984 returns, Bussey again failed to report the guaranteed payments as income. His tax preparer for those years, Angela Evans, provided Bussey with tax organizers to facilitate her preparation of his returns. The organizers expressly requested the taxpayer to provide information about any partnerships. Bussey provided none. 3 Tr. at 324, 330.

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[9] Bussey vehemently contests this point. However, based on our standard of review, we must view this issue in the government's favor.

Neither did he tell Evans anything about the Partnership or show her a K-1 for those years. *Id.* at 325, 330-31.[10] Evans testified at trial that had she seen the K-1, she would have asked Bussey about the guaranteed payment and the Partnership. *Id.*

In *United States v. Graham*, 739 F.2d 351 (8th Cir. 1984) (per curiam), we affirmed a § 7206(1) conviction based on a willful blindness instruction where the evidence showed that the taxpayer failed to give his accountant all the information relating to the taxpayer's sources of income. The taxpayer defended the failure by contending that the accountant already knew the information. *Id.* at 352. The taxpayer argued that although he may have been negligent because he did not read his tax returns before he signed them, his actions were not willful. *Id.* This court disagreed, and approved the district court's submission of the willful blindness instruction, explaining:

> The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one "knows" facts of which he is less than absolutely certain. To act "knowingly," therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, "positive" knowledge is not required.

Id. at 353 (quoting *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976)).[11] What is

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[10] Bussey claims that he never received a K-1 for the years 1982-84. The Partnership's 1065 returns indicate that he was sent the K-1s. Based on our standard of review, we resolve this conflict in favor of the government.

[11] We also approved the willful blindness instruction in *Graham* on the basis that the instructions viewed as a whole required the jury to find that the defendant acted voluntarily and intentionally, and not because of an accident, mistake or other innocent reason. 739 F.2d at 353. In this case, the jury was

(Footnote 11 continued next page)

apparent in this case is that Bussey knew the guaranteed payments had income tax consequences but deliberately sought to avoid learning anything about the specifics of those consequences. Bussey directed Steiner away from the payment in 1981 by telling the accountant the payment went somewhere else. In 1983 and 1984, he did not tell Evans anything at all. Bussey asked no questions, sought no guidance, did not research, all despite his claimed unfamiliarity with partnership taxation. Nor did he read his returns or the contracts he signed. From these actions, or lack thereof, a jury could reasonably infer that Bussey consciously avoided any opportunity to learn what the tax consequences were, and could then infer the requisite willfulness required by the statute. Therefore, based on the evidence adduced at trial, we conclude that the district court properly included an instruction on willful blindness for the § 7206 charges.

2. The § 7203 Conviction

Bussey was also convicted of willfully failing to file an income tax return for the year 1982. We are not sure of the nature of his appeal of this conviction. In the summary of his brief, Bussey claims that the willful blindness instruction, combined with prosecutorial misconduct, "tainted the misdemeanor verdict." Bussey's Brief at 10. However, in his discussion of the willful blindness instruction, Bussey's rather confused brief contains no mention of the misdemeanor conviction. Whatever the nature of Bussey's argument, we do not believe that the jury convicted Bussey based on the willful blindness instruction, for there was ample evidence that he willfully failed to file the 1982

(Footnote 11 Continued)

similarly instructed: "The word 'willful' as used in [§§ 7203 and 7206] means the deliberate, voluntary and intentional violation of a known legal duty, as distinguished from careless, inadvertent or negligent action." Instruction 50.

return. In *Cheek v. United States*, 111 S. Ct. 604 (1991), the Supreme Court stated: "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 610. In this case, the government proved that Bussey had a duty to file a 1982 income tax return. It also proved that Bussey knew of his duty, based on his own testimony that in 1984 he had given his financial records for 1982 to Steiner, who was to prepare Bussey's 1982 return.[12] Bussey's knowledge of this duty was also proved by the testimony of an Internal Revenue Service agent who interviewed Bussey in May 1987. During the course of the interview the agent asked Bussey about the status of the 1982 return, and Bussey replied that it had not been filed yet because he had had trouble getting the documents together, and because he was very busy and had not had the time. 6 Tr. at 96.

As regards the final requirement, there was evidence at trial from which the jury could infer that Bussey voluntarily and intentionally violated his duty to file a 1982 return. This evidence includes Bussey's testimony that in 1984 Steiner had refused to accept his 1982 financial records until Bussey had organized them, that he had left the records in his car, and that vandals then broke into the car, poured gasoline on the driver's seat, and set the car on fire. 7 Tr. at 271. Bussey's 1982 records were destroyed in this fire. *Id.* At the May 1987 interview, Bussey admitted not having filed a 1982 return, but mentioned nothing about his records having been destroyed. 6 Tr. at 95. Moreover, in his October 15, 1983, recertification application for the HUD subsidy, Bussey represented that he had filed his

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[12] Steiner disputed Bussey's claim, testifying that Bussey never gave him any records for 1982.

1982 return in August 1983.[13] *See* App. 5, at 3. From this conflicting evidence, a jury could reasonably infer that Bussey intentionally failed to file a 1982 return and then sought to cover up his act. Therefore, because there was evidence from which a jury could conclude that Bussey willfully failed to file a 1982 return, the willful blindness instruction did not improperly taint the misdemeanor conviction. *Cf. Mattingly*, 924 F.2d at 792 ("Furthermore, we believe that even if the jury was mistaken about the role of willful blindness, the record indicates that the jury was presented with sufficient evidence of actual knowledge to find appellant liable, thus making any error harmless.").

Bussey also argues that two recent cases, *Cheek v. United States*, 111 S. Ct. 604 (1991), and *Mattingly v. United States*, 924 F.2d 785 (8th Cir. 1991), support his argument that the district court erred in giving a willful blindness instruction. Bussey's reliance on both cases is seriously misplaced. In *Cheek*, the Supreme Court reversed the Seventh Circuit's ruling that "a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law, if it is to negate willfulness, must be objectively reasonable." 111 S. Ct. at 610. *Cheek* did not involve a willful blindness instruction and is therefore irrelevant to Bussey's willful blindness issue on appeal. Also of little help to Bussey is *Mattingly*, wherein this court stated that in tax fraud cases under 26 U.S.C. § 6701, which requires that a defendant who helps a taxpayer prepare a return "know" that the return understates the taxpayer's liability in order to be convicted, a willful blindness instruction would be error if it allowed the jury to use willful blindness as a substitute for knowledge. 924 F.2d

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[13] It appears that Bussey's law firm filed its 1982 partnership tax return in August 1983. The HUD form, however, clearly requests the applicant to provide information concerning the applicant's previous year's tax return. Therefore, Bussey cannot convincingly argue that he believed the partnership return was sufficient.

at 791-92. Our observation in *Mattingly* was based on the language and legislative history of § 6701, *id.* at 791, neither of which are at issue in this case.

Bussey argues that like § 6701 *Mattingly*, §§ 7206 and 7203 require actual knowledge. The plain language of the statutes refutes this contention, as did the court in *Mattingly* in discussing the appropriateness of the willful blindness instruction: "Section 7206(2) . . . requires *willful* assistance in the commission of a direct tax fraud. In that context evidence of willfulness and a jury instruction on willfulness is properly before the jury. In contract, § 6701 at issue in the present case *does not contain the willful language* . . . but instead contains the term 'knows.' " *Id.* at 791 (emphasis added). We recognized in *Mattingly* that Congress chose to use "knows" in some criminal tax provisions and the less stringent "willful" in others. *Id.* Apparently Bussey has missed this distinction. Therefore, *Mattingly* doe snot stand for the proposition that the willful blindness instruction is improper in §§ 7206 and 7203 prosecutions, and Bussey's argument is unavailing.

4. 18 U.S.C. § 1001 Conviction

The jury also convicted Bussey of knowingly and willfully making a false statement to HUD. In his brief on this issue, Bussey makes a conclusory statement that the willful blindness instruction tainted his conviction, *see* Bussey's Brief at 19, but he again fails to discuss how the instruction specifically affected the § 1001 charge. We note, however, that the court in *Mattingly* did observe that where a statute requires a defendant to have known a fact, a willful blindness instruction would be improper if it "allowed willful blindness to go beyond an inference of, and act as a substitute for, knowledge." 924 F.2d at 792. Because § 1001 requires knowledge as well as willfulness, we examine the instructions and the evidence to determine whether the jury in this case could have substituted willful blindness for knowledge.

The instructions on this charge required the jury to find that Bussey acted knowingly and willfully, and defined willfully as something "done voluntarily and intentionally, and with the specific intent to do something the law forbids." Instruction 19, 24. Because these instructions clearly emphasized the importance of finding specific intent to violate the law, they did not authorize the substitution of willful blindness for knowledge. *See Mattingly*, 924 F.2d at 792.

The 1983 HUD recertification form requests that the applicant provide information about his or her income as follows:

> (1) How much did each person make last year, broken down by where the money came from? (2) How much does each person make right now? (3) How much does each person expect to make in the next 12 months, including raises, overtime, part-time jobs, etc.? You must show all money received, no matter where it comes from.

U. S. Department of Housing and Urban Development, Recertification of Family Income and Composition, Section 235(b) Form, *reprinted in* App. 5, at 3. Because the form was filled out in 1983, Bussey's income in 1982 was to be included. The only income he reported was $22,800 from his law firm. There was evidence at trial, however, that Bussey received substantial income from other sources that year, including $18,000 from Maxxam and the 1982 guaranteed payment of $174,084.

Bussey argues that the Maxxam payment was not income to him because it was actually a reimbursement for his contribution to the start-up of his law firm.[14] In 1981, Bussey had joined with two others in forming the law Partnership of Bussey & Jordan.

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[14] Bussey makes this argument in his cursory statement of the facts of this case. *See* Bussey's Brief at 7.

At trial, Bussey's law partner, Lloyd Jordan, testified that they had agreed that the Maxxam funds were income to the firm, and that the funds would be used to reimburse Bussey's $10,000 outlay for the firm's start-up costs. 7 Tr. at 41. The firm did not treat the monies as income, however. Rather, Maxxam sent the checks directly to Bussey, who deposited them into his personal account. 8 Tr. at 156. The firm had no record of the checks, *see* 8 Tr. at 91, and Jordan had no idea how much Bussey was receiving from Maxxam. *See* 8 Tr. at 86-87. Neither the firm nor Bussey reported the $18,000 as income. Both Jordan and Bussey testified that Bussey was never involved in financial affairs of the firm and that he let Jordan take care of everything. 7 Tr. at 67, 261. Bussey testified that he believed the $18,000 was firm money. 8 Tr. at 41. But he also testified that he did not perform legal services for Maxxam and that the firm had no claim to the money Maxxam paid him. 8 Tr. at 156.

In brief, the evidence shows that Bussey received $18,000 from Maxxam for non-legal services, that Bussey got Jordan to agree that these were Partnership funds that would be used to reimburse Bussey's $10,000 contribution to the law firm, and that the funds were never reported as income to the firm or to Bussey, but were deposited into Bussey's personal account. From this evidence, and the guaranteed payment evidence discussed above, the jury could reasonably infer that Bussey deliberately never checked to see how the law firm was treating the Maxxam money or how he should treat the guaranteed payments. This inference in turn supports the inference that Bussey knew the $18,000 Maxxam payment was income to him, as was the guaranteed payment discussed above. Therefore, we conclude that the jury did not substitute willful blindness for knowledge in this case, but rather used it appropriately to infer knowledge.

In sum, the district court properly submitted a willful blindness instruction to the jury in this case. Bussey strenuously

argues against the propriety of the instruction, contending that he was convicted merely for being negligent and for relying on the advice of his accountants. Bussey misses the point of a willful blindness instruction. As the First Circuit has observed: "The purpose of the willful blindness theory is to impose criminal liability on people who, recognizing the likelihood of wrongdoing nonetheless consciously refuse to take basic investigatory steps." *United States v. Rothrock,* 806 F.2d 318, 323 (1st Cir. 1986). By consciously avoiding discovery of the financial consequences of the guaranteed payments and the Maxxam income, Bussey was able to file false tax returns and false recertification form, and yet now can argue lack of knowledge. We also note that Bussey defends his activities, or lack thereof, with respect to the guaranteed payments on the grounds that he believed Thomas was taking care of the accounting, that none of the Partnership's accountants contacted him about how the guaranteed payments should be treated, and that Steiner committed accounting malpractice and lied at tried to cover it up. These arguments, however, are irrelevant to the question of whether the evidence supported the district court's submission of the willful blindness instruction. Furthermore, they are simply more evidence of Bussey's general penchant for avoidance. His entire defense on the issue of the guaranteed payments was premised on the failures of others to tell him things or do things for him, specifically Thomas, Steiner and the Partnership's accountants. The jury determined, however, that the responsibility for Bussey's current predicament rests squarely on his own shoulders. We agree.

B. Sufficiency of the Evidence

Bussey next argues that the evidence at trial was insufficient to allow the jury to find him guilty beyond a reasonable doubt. In evaluating the sufficiency of the evidence supporting a guilty verdict, we review the evidence in the light most favorable to the government and we give the government the benefit of all

reasonable inferences. *See, e.g., United States v. Kouba*, 822 F.2d 768, 773 (8th Cir. 1987). We believe the evidence and inferences discussed in the foregoing section refute Bussey's contention.

The specific focus of Bussey's argument appears to be that the government did not prove that he took an affirmative act in furtherance of the crimes with which he was charged and thus that the government failed to prove willfulness.[15] It is hornbook law that two of the essential elements of a crime are conduct and intent. *See generally* 1 W. LaFave & A. Scott, Substantive Criminal Law § 3.1 (1986) (discussing the premises of criminal law). Bussey seems to have conflated the two separate elements. The conduct for which he was convicted was filing false income tax returns, failing to file a return, and making a false statement to a government agency. The government clearly proved this conduct. As discussed in Part II.A., the government also proved the intent necessary for the various charges, i.e., willfulness (for the §§ 7206 and 7203 charges) and willfulness and knowledge (for the § 1001 charge). Therefore, Bussey's sufficiency argument fails.

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[15] Bussey's argument on this issue is as follows:

> The Appellant maintains that Government did not prove an "affirmative act" of willful conduct. As a result Government failed to prove the essential element of willfulness as a matter of law. The "Jewell" instruction combined with prosecution's failure to prove affirmative willful act conduct allowed the jury to convict the Appellant based on a negligence or reckless standard which is inconsistent with requirements of the law.

Bussey's Brief at 20.

C. Bussey's "Expert" Testimony

Bussey next argues that the district court erred in preventing one of his witnesses from testifying.[16] The district court, under Fed. R. Evid. 608(b), excluded the testimony on the ground that Bussey was seeking to impeach the testimony of Irl Steiner, Bussey's 1981 tax preparer and a government witness.[17] We review evidentiary rulings only for abuse of discretion. *See United States v. Shyres*, 898 F.2d 647, 656 (8th Cir.), *cert. denied*, 111 S. Ct. 69 (1990).

At trial, Steiner testified on direct examination that Bussey gave him the Partnership's 1981 K-1; that Bussey told Steiner that the income from the K-1 was not his, but had gone to the corporation; and that Steiner told Bussey that the Partnership's return and the K-1 should be amended and that if the K-1 was not changed, Bussey would have to pay additional taxes. 3 Tr. at 185-88. On cross-examination, Bussey asked Steiner about a checklist prepared by the accountant who reviewed Steiner's 1981 work. Steiner testified that the checklist includes things that still need to be done for the taxpayer. A completed item is initialed or checked off. One of the items on the list for Bussey's return was: "If no amended form 1065 with K-1s was filed for Eastview Terrace we should suggest this to avoid a problem with guaranteed payments." 3 Tr. at 220. Steiner conceded on cross-examination that the item was never checked off. *Id.* He maintained, however, that he had nonetheless discussed the necessary changes with Bussey. *Id.* at 226.

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[16] The district court did permit the witness to testify on other issues, but Bussey chose not to call him.

[17] Federal Rule of Evidence 608(b) provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility ... may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness ...."

Bussey sought to introduce the testimony of Steven Conway, an accounting expert, making the following offer of proof:

> As to the offer of proof, it's my understanding that if Mr. Conway were called concerning the testimony of Mr. Steiner, he would, in fact, tell the jury that there is [sic] standard accounting procedures, which are generally known as clearing the points, which if the procedure were followed in this case by [Steiner's firm] was to have [sic] second person review the accounting notes, the tax return Mr. Steiner prepared for Mr. Bussey, and then prepare a bunch of checklist points.
>
> These points are generally listed on one side of the paper, and with room left on the other side of the paper to check off those points.
>
> It was very clear that Mr. Steiner's testimony that they went through, I think it was six points.
>
> Having checked off five out of those six points, and left one totally blank, which deals directly with the issue of whether Mr. Bussey was told to get an amended K-1.
>
> That note of Mr. Weber's was, in effect, that we should suggest to the client that an amended K-1 be received from Eastview Terrace Limited Partnership.
>
> There was no connotation that that was ever done or checked off by anyone.
>
> And Mr. Conway would testify that that is against accounting procedures and [sic] clear indication that, in fact, such statements as to clearing that point were never done.

8 Tr. at 240-41.

Bussey makes numerous arguments attempting to convince us why the district court erred in excluding Conway's testimony but all fail in light of the straightforward dictates of Rule 608(b).[18] Bussey's offer of proof at trial unquestionably shows that Conway's testimony was intended to show that Steiner did not tell Bussey to get the K-1 amended. By addressing this specific instance of Steiner's conduct, Bussey obviously sought to use Conway to attack Steiner's credibility. Rule 608(b)'s plain language prohibits the use of extrinsic evidence for such purposes.

It is apparent that Bussey had every opportunity to impeach Steiner on cross-examination, and that the jury had to be aware of the conflicting testimony as to whether Steiner told Bussey to get the K-1s amended. The jury apparently resolved that credibility issue against Bussey, however, so he now asks this court to revisit it in the garb of an evidentiary issue on appeal. This we will not do, for the simple reason that the district court properly excluded the testimony based on Bussey's offer of proof.

D. Prosecutorial Misconduct

Finally, Bussey advances a hodgepodge of arguments in support of the proposition that the district court erred in not granting him a new trial on the basis of prosecutorial misconduct. The grounds for the alleged misconduct include the government's

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[18] We note that in his brief on this issue, Bussey raises arguments for the admission of Conway's testimony that he did not make in his offer of proof, e.g., "The issue herein was not the truthfulness or untruthfulness of Ir! Steiner. It was the reasonableness of the Appellant's reliance on the accountant's advice." *See* Bussey's Brief at 34. Not only do we question the accuracy of Bussey's characterization of the issue, but because these arguments were not raised in the offer of proof, we will not consider them here.

reference to Bussey's transferring the guaranteed payments to his father as a "kickback," the government's misstatement of certain dates, and the government's "vigorous advocacy for a denial of opportunity for Appellant's witness to testify regarding accounting errors made by the Government's witness Irl Steiner and the prosecutor's misdirection of the court on the rules of evidence surrounding the proposed testimony." Bussey's Brief at 42-54. Although the nature of these grounds varies, they all share one feature—none of them constitutes prosecutorial misconduct.

To prove prosecutorial misconduct, an appellant must show that: "(1) the prosecutor's remarks or conduct [were] improper, and (2) such remarks or conduct . . . prejudicially affected the defendant's substantial rights so as to deprive him of a fair trial." *United States v. Pierce*, 792 F.2d 740, 742 (8th Cir. 1986). None of the grounds Bussey has alleged satisfy both of these requirements. For example, the prosecution's "vigorous advocacy" that Conway's testimony should be excluded under Fed. R. Evid. 608(b) was obviously not improper. Neither was the limited reference to "kickback," in that Bussey headed a development project originally begun by his father and then passed monies from the development to his father. The government's misstatement of certain dates, while improper, appears to have been innocent. Moreover, because of the overwhelming evidence of Bussey's guilt, the misstatements did not deprive Bussey of a fair trial. We do not discuss Bussey's other grounds for the alleged misconduct because they are similarly unavailing.

III.

Accordingly, we affirm Bussey's conviction.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

United States District Court
Eastern District of Missouri

Case Number: 88-260CR(5)

UNITED STATES OF AMERICA

V.

CHARLES L. BUSSEY, JR.
2201 Clayville Ct.
St. Louis, MO 63017

Byron Neal Fox
Attorney for Defendant

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s) _____, and ☒ not guilty as to count(s) 1,2,3,4,5 & 6.

THERE WAS A:

[☐ finding ☒ verdict] of guilty as to count(s) 1,2,3,4 & 5.

THERE WAS A:

[☐ finding ☒ verdict] of not guilty as to count(s) 6.

☐ judgment of acquittal as to count(s) _____.

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Filing a fictitious & fraudulent statement with the Dept. of Housing and Urban Development under Title 18, U.S.C., Section 1001. Filing an incorrect income tax return under Title 26, U.S.C., Section 7206(1). Failing to make an income tax return under Title 26, U.S.C., Section 7203.

IT IS THE JUDGMENT OF THIS COURT THAT: The defendant is committed to the custody of the Attorney General of the United States or his authorized representative for a term of imprisonment of three years under count 1.

Further ordered that the defendant is given three years imprisonment under count 2, which is to run concurrently with the term imposed in count 1.

Further ordered that the defendant is given three years imprisonment under count 4, which is to run concurrently with the terms imposed in counts 1 and 2.

Further ordered that the defendant is given three years imprisonment under count 5, which is to run concurrently with the terms imposed in counts 1,2 & 4.

Further ordered that the defendant is given one year imprisonment under count 3, which is to run concurrently with the terms imposed in counts 1, 2, 4 & 5.

Further ordered that the defendant shall make restitution in the amount of $7,883.00 under count 1. Said restitution to be paid during the first 60 months after release from confinement at the rate of $132.00 per month as directed by the U. S. Probation Office.

Further ordered that the defendant shall pay the costs of prosecution of counts 2, 3, 4 & 5.

Restitution is to be made to the United States Department of Housing and Urban Development.

Further ordered that the defendant is granted a stay of execution of sentence until arrangements are made for transportation and commitment, and may voluntarily surrender at the designated institution as directed by the U. S. Marshal. Said surrender date is not to be before 30 days from this date.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2112 EM

CRIMINAL

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

CHARLES L. BUSSEY, JR.
Defendant-Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF MISSOURI
CASE NO. 88-260CR(5)
THE HONORABLE STEPHEN N. LIMBAUGH,
PRESIDING

DEFENDANT-APPELLANT'S SUPPLEMENTAL REPLY BRIEF

PURSUANT TO RULES 28(g) and 28(j) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Lloyd J. Jordan
Carl W. Bussey
411 N. 10th Street, Suite 402
St. Louis, MO 63101
(314) 231-0065

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I.

THE DISTRICT COURT ERRED GIVING THE JURY THE *JEWELL* INSTRUCTION BECAUSE THERE WAS INSUFFICIENT FACTS OF EVIDENCE THAT SUPPORTED AN INFERENCE OF APPELLANT'S DELIBERATE IGNORANCE

The Court in *Cheek v. United States*, Slip Opinion No. 89-658 January 8th, 1991 held inter alia, that "a good faith misunderstanding of the law or a good faith belief that one is not violating the law negates wilfulness [sic], whether or not the claimed belief or misunderstanding is *objectively reasonable*" (Emphasis added).

In making that determination, the Court reviewed its history of holdings in criminal tax cases and the standards for determining criminal wilfulness [sic] in tax cases. See *Cheek*, supra, pages 5-8. The court specifically reviewed the Seventh circuit's added requirement that any belief held by the taxpayer must be "objectively reasonable". The court specifically overruled that added requirement imposed as a matter of law.

The parallel in the instant case is that the trial court by giving the Jewell Instruction in this criminal tax cases allowed standard of proof on a "specific intent" crime (a willful criminal tax crime) to be reduced to proof of Wilfulness [sic] to standard of knew and should have known. The standard of knew or should have known may be negligent under the Model Penal Code Section 2.02, but is does not rise to the level of the specific affirmative act wilfulness [sic] required by 26 U.S.C. 7201(6) or 7203.

II.

THE DISTRICT COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL, BECAUSE THE EVIDENCE WAS NOT SUFFICIENT TO PROVE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT

The Appellant argued in Appellant's Brief Argument II, page 25 that the government failed to prove by sufficient evidence the element of wilfulness [sic] beyond a reasonable doubt.

The court in *Cheek*, supra page 7-9, examined the sixty year history of its decisions regarding the interpretation of "wilfulness [sic]". In *Cheek* at page 9, the court stated, **"wilfulness [sic], as construed by our prior decisions in criminal tax cases, *requires* the Government to prove that the law imposed a duty on the defendant, that the defendant *knew* of this duty, and that he voluntarily and intentionally violated the duty".** (Emphasis added)

The Appellant maintains that the only proof offered that the "defendant knew of this duty" was contradictory testimony of W. A. Thomas and the tentative testimony of Irl Steiner. See Appellant's Reply Brief pages 2-8. Therefore as a matter of law the government evidence did not meet the statutory test of proof of wilfulness [sic] and therefore proof of guilty, beyond a reasonable doubt. The Appellant's Motion For Judgment of Acquittal should have been granted.

The court in summation of its decision on the issue of willfulness, in *Cheek*, stated at page 9, that "in the end, the issue is whether, based on ***all the evidence***, the Government has proved that the Defendant was ***aware of the duty at issue***, ... (Emphasis added).

The trial court's giving of the notorious "Jewell Instruction" over the objection of the Appellant, allowed the jury to ignore the

standard of willfulness approved in *Cheek*. As a result the jury was allowed to convict the defendant on a simple negligence standard as opposed to the "specific intent" statutorily required in criminal tax cases and as reaffirmed in *Cheek*, at page 7. See Appellant's Brief pages 15-19. Appellant Reply Brief pages 1-9.

In Appellant's Reply Brief at p. 14, Inference No. 4, the Appellant refutes the government's attempts to infer superior knowledge based on irrelevant evidence. The court in *Cheek* made a clear distinction between the common law presumption that all persons were deemed to know the law. The Court in *Cheek* stated at p. 7.

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the court almost 60 years ago interpreted the statutory term *"willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws*. (Emphasis added). In *United States v. Murdock*, 290 U.S. 389 (1933), the Court recognized that:
>
> > "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." Id., at 396."

III.

THE DISTRICT COURT ERRED BY PREVENTING APPELLANT, PURSUANT TO RULE 608(b) OF THE FEDERAL RULES OF EVIDENCE, FROM PRESENTING EXPERT TESTIMONY REGARDING THE APPELLANT'S WILFULNESS [SIC] BASED ON GOVERNMENT'S OWN EXHIBIT

The Appellant maintains that the trial court committed reversible error when it refused to allow Appellant rebuttal witness, Steven J. Conway, to testify regarding Government Exhibit 71. The proposed testimony would have negated the Appellant's wilfulness [sic]. See Appellant's Brief pages 30-33, Appellant Reply Brief p. 21-25.

The Court in *Cheek*, supra p. 10, stated that **"forbidding the jury to consider evidence that might negate Wilfulness [sic] would raise a serious question under the Sixth Amendment's jury trial provisions."** (Emphasis added) This statement by the Court in *Cheek* confirmed the 8th Circuit's similar holding in *United States v. Parshall*, 757 F.2d 211, 213 (8th Cir. 1985).

Because of the trial court's ruling preventing Conway's testimony, the jury was never allowed to understand the impact of the Government's own Exhibit 71, page 17, which negated Defendant's wilfulness [sic]. The importance of the fact that the Government's own witness, Irl Steiner had signed the Appellant's 1981 tax return representing to the Appellant that it was accurate, was withheld from the jury as a result of the Court's denial of Conway's testimony. Both Exhibits were inconsistent with the Government's argument that the Appellant was aware of the duty that the law imposed on the Appellant on the specific items charged in the indictment.

CONCLUSION

For each of and all the foregoing reasons, the Appellant's conviction on Counts I, II, III, IV and V should be reversed.

Respectfully submitted,

By: /s/ LLOYD J. JORDAN
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314/231-0065
Attorneys for Defendant

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was hand delivered, this 12th day of February, 1991, addressed to:

Steven E. Holthouser, Esq., Assistant United States Attorney, United States Court & Custom House, 1114 Market Street, Room 421, St. Louis, MO 63101.

/s/ Lloyd J. Jordan

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2112 EM

CRIMINAL

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

CHARLES L. BUSSEY, JR.
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF MISSOURI
CASE NO. 88-260 CR(5)
THE HONORABLE STEPHEN N. LIMBAUGH,
PRESIDING

APPELLANT'S PETITION FOR REHEARING

Carl W. Bussey, Esq.
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2112 EM

UNITED STATES OF AMERICA,
Appellee,

vs.

CHARLES L. BUSSEY, JR.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

APPELLANT'S PETITION FOR REHEARING

COMES NOW Charles L. Bussey, Jr., Appellant, by and through his undersigned attorney, and respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in the above-entitled cause. In support of this petition, Appellant represents to the Court as follows:

1. The Court's holding that the trial court did not commit error in allowing the "Jewell", or "conscious avoidance" instruction to be given to the jury, in a tax fraud case. In such tax fraud cases, the United States Supreme Court has ruled that specific intent crimes and the allowing of the "conscious avoidance" instruction will set a dangerous precedent, in that it did, and will now allow juries to convict one accused in a tax fraud case on less than the standard statutorily required for felony convictions in such cases. The principal basis for the court misapprehension is the definition by "willfullness [sic]" in criminal tax cases. Willfullness in tax cases have three elements, one of which is "knowledge". Knowledge is an element of tax willfullness [sic] requires "actual knowledge". This knowledge is distinguished from the knowledge customarily referred to in criminal statutes (See page 6 of Appellants [sic] Petition for Rehearing.)

2. The Court's holding that the trial court did not err in refusing certain proffered testimony by one of the Appellant's witnesses to be entered into evidence is improper and will result in numerous unfair convictions in tax fraud cases. The precedent will be set whereby taxpayers will be held criminally liable for their negligence or mistakes of tax return preparers and accountants, in our very difficult and hard to understand tax system.

3. The Court's holding that any prosecutorial misconduct practiced in the present case will set a dangerous precedent in that it will give prosecutors the "green light" to use such unfair tactics, resulting in the further erosion of this system of justice's longstanding principal that there must be sufficient evidence beyond a reasonable doubt presented for one to be convicted of a felony tax crime.

STATEMENT OF FACTS

The court's statement of facts assumed or stated facts not in evidence which allows the court to speculate as to certain conclusions in its review of the record.

1. Decision, p. 4 - footnote 3 - Contrary to the courts [sic] statement, Thomas did not simply notice that his Eastview K-1 was incorrect. He was audited by the IRS and corrected it thereafter without notice to the Appellant by Thomas or his accountant Melman. (Melman TR3-93)

2. Decision, p. 4 - Contrary to the courts [sic] statement, Steiner never informed the Appellant of anything. He prefaced his testimony comments with the conditional and doubtful, **"I believe I would have informed Bussey like we do with most clients."** This statement was far from the kind of certainty that the Court sets forth in its facts.

3. Decision, p. 6 - Regarding Angela Evans - the court states that "Bussey did not mention that guaranteed payments in the

organizer. He also did not show Evans the Partnership K-1's [sic] and did not inform her of any tax consequences related to the Partnership K-1". The record shows that there is no proof that Appellant had the K-1's [sic] for 1982, 1983 and 1984 nor is there any evidence that Bussey knew the tax consequences of the K-1's [sic].

ARGUMENT

1. *Giving of the Jewell Instruction . . .*

The "Jewell", or "conscious avoidance" instruction has been viewed with distaste in all federal circuit courts. In 1986, the Eighth Circuit in *United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986), adopted the standard of other circuits for granting a request to give the Jewell instruction by holding, **"that such an instruction should not be given in all cases because of the possibility that a jury would be led to employ a standard of negligence and convict a defendant on the impermissible ground that he (defendant) *should have known* that an illegal act was taking place"**. *See* also *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984) (per curiam) *United States v. McAllister*, 747 F.2d 1273 (9th Cir. 1984).

In addressing Appellant's first of four (4) arguments[1] on appeal as to error committed by the trial court in giving a willful blindness instruction, this Court chose to focus on the guaranteed payments received by Appellant in connection with the Eastview Project in its effort to show that no such error was committed.

---

[1] The Appellant [sic] Court on page 8 of its Decision refers to Appellant's argument on appeal regarding error by the district court in giving the Jewell instruction as Appellant's primary argument. In reality, such argument is but one of four (4) arguments set forth in Appellant's Brief, all of equal importance and any one (1) of which put forth adequate grounds for reversal or remand.

But *in so doing, the rational descendi* was improper. In indeed viewing the evidence in the light most favorable to the government, there was no evidence of deliberate ignorance on the part of Appellant cited.

What the Court does do in its Decision is refer to portions of the trial transcript, (none of which rose to the level of *affirmative felony* conduct required by *Spies*) tending to indicate that Appellant was negligent; (1) the court stated that the Defendant never read the partnership contract which was presented to Appellant on the day before the closing or the DA or his own tax returns; (2) The court states that the Appellant did not report certain guaranteed payment even though he knew he had earned and received it; (3) the court states that Steiner (accountant), after receiving the 1981 K-1 advised Appellant to amend the Partnership's 1981 return and K-1's [sic]. This was not Steiner's testimony; (4) the court states that defendant failed to provide information to his tax accountant. However, there was no proof or testimony that the Appellant ever received the K-1 information for 1982, 1983 and 1984. In the Decision at page 13, footnote 10, the Court simply shifts the burden of proof to the Appellant stated that this matter is resolved in favor of the government. There is no evidence in the court's records that the K-1's [sic] for 1982, 1983 and 1984 were ever mailed or received by the Appellant. There are no transcripts. Such acts, according to the Court's reasoning, supported a giving of the willful blindness instruction.

But the established law is that use of the "Jewell" instruction is limited to those cases where there is evidence that the accused *purposely contrived* to avoid learning all of the facts in order to have a defense in the event of being arrested and charged. *See United States v. Alvarado*, 817 F.2d 580 (9th Cir. 1987). It is the prosecution's burden to present evidence that the defendant *purposely* avoided obtaining *actual knowledge*, *Alvarado, Id.* at 584, and this burden cannot be met by demonstrating that

defendant was mistaken, recklessly disregarded the truth, or was negligent in failing to inquire.

In the case at bar, the Appellant testified that he had never received a 1982, 1983 or 1984 K-1 (Decision, p. 13). Further, the government never met its burden of proof by proving beyond a reasonable doubt that the K-1's [sic] were mailed or received in any year other than 1981. What the Court states in its Decision as being apparent, the government also never proved beyond a reasonable doubt and rises to the level of mere suspicion. There was not any any evidence or testimony presented at trial that Appellant purposely contrived to avoid obtaining actual knowledge. The evidence and testimony presented does show that:

(a) the accountant(s) involved in preparation of Eastview Partnership tax return did not attempt to contact the Appellant regarding that matter **Transcript, hereinafter "TR"-v 3, p. 132, Zamore) (TR-V3, p. 113, Feldman) and (TR-V2, p. 73, 74, 77, 78, Toca);**

(b) Appellant left the tax matters to Thomas, **(TR-V2, p. 50, 51, 102-104, 107);**

(c) Thomas' accountant contacted the Eastview accountants after Thomas had been audited by the IRS regarding changing the Eastview K-1 for Thomas' benefit; Melman **(TR-V2, p. 93, 102, 121, Thomas) (TR-V2, p. 120, Melman)**; and Melman made no attempt to contact the Appellant regarding Eastview **(TR-V2 3, p. 87, Melman);**

(d) Thomas was the one who gave direction to the parties in the Eastview transaction **Sanders, TR-V 2, p. 65, TR-V 2, p. 70)**; and

Other cases are cited in Appellant's brief on p. 13 that support the position that *the prosecution's burden is not met by a showing*

of highly suspicious circumstances. United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982). *See* Decision, 1st paragraph, p. 14. At best, such evidence and testimony presented showed only negligence on the part of Appellant.

The case of *United States v. Graham*, 739 F.2d 351 (8th Cir. 1984) (per curiam), cited by the Court in its decision and therein (*Graham*) in which a section 7206(1) conviction based upon a willful blindness instruction was given, does not apply to the case at bar. In *Graham*, there was affirmative testimony and evidence presented showing that Graham had deliberately hid his financial records from his tax preparer for a *whole separate business*. But in this case, there was not any evidence of willful withholding, or even positive evidence that Appellant had contrived to withhold any information. In fact, Appellant told Steiner what Appellant believed to be true. Unlike Graham's accountant, Steiner had all the documents to properly prepare Appellant's 1981 tax return. Steiner had the 1981 K-1 in his possession and violated his tax return preparers [sic] duties according to 26 USC 6944 and its regulations. There is no testimony or proof that the Appellant knew that the K-1 was erroneous at the time that Steiner prepared the 1981 tax return. Steiner's testimony was that *he believed*, as he normally would do, that he told the Appellant that the K-1 should be amended. Steiner's statement is far from the kind of certainty of evidence beyond a reasonable doubt.

In the Court's attempt to distinguish two (2) recent cases cited by Appellant in his Rule 28(g) and 28(j) submissions as giving support for his argument that the district court erred in giving a Jewell instruction, this Court opines that Appellant's claim "that those cases support his argument" ... is seriously misplaced (Decision, p. 16). However, it is the Courts [sic] interpretation of the decision in both of said cases that appears to be seriously misplaced.

It is true that *Cheek v. United States*, 111 S. Ct. 604 (1991) did not involve the giving of a willful blindness instruction. The *Cheek* case does make clear that a tax violation is a "specific intent" crime and that the accused must have known (actual knowledge) of his or her duty and *specifically intended* to violate that specific duty. It also makes clear that willfulness requires the government to prove the law imposed a duty upon the defendant, the defendant knew of the duty, and that he voluntarily and intentionally violated that duty (*Cheek*, at p. 3, 4). Such being the case, Appellant argues that *Cheek does* give direct guidance as to when a willful blindness instruction should be given. Put in simple terms, Appellant submits that the rules and laws as set down by the Supreme Court of the United States are directly applicable to all cases covered by that topic. To agree with the Court's view is to agree that the giving of a death penalty instruction would not have violated a defendant's constitutional rights during the period of time in which it was the decision of the Supreme Court of the United States that the death penalty was unconstitutional.

Regarding the case of *Mattingly v. United States*, 924 F.2d 782 (8th Cir. 1991), the Court did state that in tax fraud cases under 26 U.S.C. section 6701, **a willful blindness instruction would be error if it allowed the jury to use willful blindness as a substitute for knowledge,** *Id.* at p. 791-92. But in its decision, the Court states that the principle stated in *Mattingly* was based on the language and legislative history of section 6701, and that principle was not at issue in Appellant's case. The Court should realize, however, that although section 6707 does not contain the same language as does sections 7206 and 7203, *actual knowledge* as an element of willfulness is a prerequisite for conviction in all the sections of the tax code requiring willfulness. Further, in *U.S. v. Bishop*, 412 U.S. 346, 359-861, (1973), the Supreme Court made it clear that the element of "willfulness" has the same meaning throughout the Tax Code. What is misapprehended, is

that knowledge required as an element of willfulness under the Tax Code and specific intent requirement is **"actual knowledge"** This element of knowledge is distinguished from knowledge required under other criminal statutes. In each section of the Tax Code the term (willfullness [sic]);

> "connotes a voluntary intentional violation of a known legal duty. (The court) has formulated the requirement of willfulness as *bad faith or evil intent* .., or *evil motive and want of justification in view of all the financial circumstances of the taxpayer* ..., or *knowledge* that the taxpayer *should have reported more income than he did,*"

Spies v. United States, 317 U.S. 492, considered the quantum and type of evidence required to support a conviction for the substantive offense of attempt to defeat or evade federal taxes. This, in contrast with the lesser proof required to convict of the misdemeanor of willfully failing to file a return or pay a tax. The court stated, **"willful but passive neglect of a statutory duty *may* constitute the lesser offense, but to combine it with a *willful and positive* attempt to evade tax in any manner or defeat it by any means lifts the offense to degree of felony".**

The Court in its decision repeatedly refers to what the Appellant did not do. Simple justice requires the Appellant to be informed as to what positive attempt to evade taxes and that the Court deems there to have been sufficient evidence of, to support the affirmation of the Appellant's conviction of a felony tax crimes. Likewise, to give the willful blindness instruction which substitutes for proof of the element of actual knowledge in tax felony charges, it follows that there must be some affirmative act to show that the defendant purposely contrived to a lack of knowledge. Clearly, the court's decision reflects that it cannot find those examples of affirmative act conduct in the record. Therefore, the government cannot be deemed to have met its burden of proof beyond a reasonable doubt, that the Appellant committed the felony tax crimes for which he was convicted.

Cheek recognized at page 7, that the legislature carved out an exception to the common law rule that all are deemed to know the law.[2] The court states at page 21 of its decision that it is hornbook law that two essential elements of a crime are conduct and intent. But, the legislature and the courts have recognized a specific exception requiring actual knowledge in criminal tax cases. The Jewell instruction permits the required knowledge element to be inferred from willful blindness to the existence of the fact. Therefore, Appellant submits that *Mattingly* does support his position. If *Mattingly* holds that the Jewell instruction cannot be used in tax cases requiring knowledge it logically follows that it also stands for the proposition that it cannot be used in cases requiring willfulness, in that such a finding would preclude a jury from finding the necessary element of actual knowledge as a part of willfulness in felony tax criminal cases..

---

[2] Based on the notice that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes....

The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making *specific intent* to violate the law and element of certain federal criminal tax offenses (which includes all offenses in the tax code). (Emphasis added.) Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws. In *United States v. Murdock*, 290 U.S. 389 (1933), the Court recognized that:

> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." *Id.*, at 396.

Cheek, supra, does stand for the principle that tax fraud crimes are specific intents crimes, therefore, requiring actual knowledge. Such being the case, a rehearing is in order so that the dangerous precedent of permitting convictions in felony tax fraud cases on less than the statutorily required standard will be set.

2. *Trial Court's refusal to permit proffered testimony. . .*

In Section C of its decision, the Court cursorily addresses Appellant's argument on appeal that the trial court erred by denying him (Appellant) his sixth amendment right to call witnesses by refusing to permit a witness to testify. In ruling that the trial court did not abuse its discretion in permitting such witness to testify, the Court made reference to Federal Rule of Evidence 608(b) and the fact that Rule 608(b)'s plain language prohibits the use of extrinsic evidence for such purposes. The Court ignores the fact that the document to be testified about was *not extrinsic* and had been introduced by the government. In so ruling, the Court completely ignored all of the reasons why such evidence was being proffered as well as controlling case(s) that have held that under similar circumstances, the proffered evidence should have been admitted.

Even in the narrowest reading of the trial transcript as it pertains to the offer of proof regarding the accountant Steven J. Conway does not unquestionably shows that Conway's testimony was intended to show that Steiner did not tell Appellant to get the K-1 amended, as this Court opines. Steiner had already admitted that he might be guilty of malpractice (TR-V 3, p. 258, Steiner).

Appellant implores this Court to keep in mind that one of the elements required with the statutory required willfulness to be proved by the government in the prosecution of this case was "actual knowledge" on Appellant's part. Testimony by the

accountant Conway would have involved standard accounting procedures which would have tended to negate actual knowledge and therefore willfullness [sic].

As was argued by Appellant, this Court held in *United States v. Parshall*, 757 F.2d 211 (8th Cir. 1985) that the district court had abused its discretion in excluding certain proffered evidence tending to rebut the willfulness issue in a case where the element of willfulness is critical to the defense. Wide latitude, so ruled this court in *Parshall*, should be granted to a defendant in the introduction of evidence testimony to show a lack of intent when the element of willfulness is at issue. Also, the United States Supreme Court similarly held in *Cheek*, *supra* at p. 10 that "forbidding a jury to consider evidence that might tend to negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." Those two (2) cases fully support Appellant's position that the proffered evidence should have been submitted under the circumstances of this case. And yet, for some reason that perplexes the Appellant, neither case was even cited by the Court in its decision.

This point should be reconsidered because to not do so would tend to advise taxpayers in this Circuit that the burden is squarely upon their shoulders to insure the correctness of their tax returns without any right to negate the element of willfulness, if charge with a tax crime.

3. *Prosecutorial Misconduct. . .*

Finally, and in Section D of its decision, the Court "makes note" of Appellant's very important argument of prosecutorial misconduct as grounds for reversal and/or remand by indicating that "... Bussey advances a hodgepodge of arguments in support of the proposition that the district court erred in not granting him a new trial on the basis of prosecutorial misconduct." (Decision, p. 24). This Court has always viewed prosecutorial misconduct

as a serious matter, and have most courts in our judicial system. There were ample instances of such misconduct cited by Appellant's arguments in that regard. The prosecutorial misconduct is even more egregious given the fact that the government produced no proof of affirmative act conduct on the part of the Appellant. Serious consideration should have resulted in a reversal or remand on those grounds alone.

As is indicated in Appellant's brief, there were several instances of misconduct on the prosecutor's part, each of which were grounds for reversal or remand. Unlike being a hodge-podge of arguments as is indicated in the Decision, those instances were categorized and argued under Subsections A, B, C and D of Section IV of Appellant's Brief (P. 47-55).

Appellant argued under Subsection A of Section IV of his Brief that comments made by the prosecutor on his (Appellant's) post arrest silence was plain error requiring reversal. Several instances of such comments were cited, and Appellant then proceeded to cite several cases, including United States Supreme Court decisions supporting his argument that due to the prosecutor's misconduct in this regard, the error was not harmless and the conviction should be reversed. This issue of prosecutorial misconduct by making improper comments regarding Appellant's pre-arrest and post-arrest silence was not even addressed in the Decision.

Appellant argued under Subsection B of Section IV of his Brief that there was also prosecutorial misconduct at his trial in that during cross-examination and during closing argument the prosecutor accused him (Appellant), without foundation or evidence, of participating in the uncharged criminal activity of "kickbacks" an unproven *and uncharged alleged criminal act* designed solely to confuse and prejudice the jury. The plain signal by the prosecutor to the jury was to accuse the Appellant of a crime that was uncharged and unproved. The term "*kick-*

back", has no innocent meaning. Again, several instances of such misconduct were cited, and again, Appellant then proceeded to cite several Eighth Circuit and United States Supreme Court cases supporting his argument that due to the prosecutor's misconduct in this regard, the error was not harmless and the conviction should be reversed. The Court summarily addresses his 4 l/2 page argument. Appellants [sic] argument set forth the standards for reversal of a decision for prosecutorial misconduct in this regard and how his case came within those general standards - the court only restated those standards and then opined in one (1) sentence, stating that the *limited* reference to *kickbacks was not improper*" ... in that Bussey headed a development project originally begun by his father than then passed monies from the development to his father." Decision, p. 25). No law was broken or testified to have been violated. The court decision accepts the government's mere suspicion, without proof that any illegal act had occurred the term "kickback" implies. There were no badges of fraud or concealment with regard to this transaction. Because of the prosecutor's use of term "kickbacks" it cannot be said with certainty that the basis of the Appellants [sic] conviction was solely on the charges made in the information. The Appellant has a right to be tried solely and only on the charges in the information. Deprivation of such a basic right is far to [sic] serious to be treated as nothing more than variance and dismissed as harmless error. See *Stirone v. U.S.* 361 US 212, 218, 80 S.ct 270 (1960).

Appellant next argued under Subsection C of Section IV of his Brief that there was prosecutorial misconduct, in that during closing argument the prosecutor misrepresented the testimony of the key government witnesses. Instances of the misrepresentation of the testimony of the accountants Angela Evans and Irl Steiner were set forth in Appellant's Brief (p. 49-52). Appellant suggests that if those pages had been considered in depth, then no reasonable person could have comprehended and realized

that because of the nature of the charges against Appellant, that the prosecutorial misrepresentation did in fact prejudice the jury to such an extent that a reversal would be in order. In a case such as this, specific dates when events are alleged to have happened or not happened, is extremely important. They indicate what the Appellant knew and when did he know. But yet the Court in its decision and in briefly addressing the misrepresentation of dates appears to naively believe that such misrepresentation as to dates, while improper, appeared to have been innocent (Decision, p. 22).

Finally, and in Subsection D of Section IV of his Brief, Appellant argues, and then cites cases, as to why the trial court decision in his case should be reversed, not only because of any one of the groupings of prosecutorial misconduct cited in Subsection A, B, and C of Section IV of his Brief, but also because of the cumulative effect said misconduct had in denying him a fair trial. Assuming, *arguendo* that the groupings of prosecutorial misconduct set forth under Section A, B and C of Section IV did not, individually, rise to the level of misconduct necessary for reversal, it necessarily follows that the cumulative effect of the same would do so. And yet the decision does not attempt to discuss and make a decision on the cumulative effect that prosecutorial misconduct may have had upon the trial jury verdict, especially when there was no affirmative act conduct on the part of the defendant.

Prosecutorial misconduct is a serious matter - one that should, and is normally not viewed upon lightly by this Court. In ruling as it did on this issue, that ruling demonstrates a misunderstanding on this Court's part of the numerous cases, United States Supreme Court cases included, of the serious nature of such misconduct and what constitutes the same. Respectfully, the Court should now rehear and reverse its Decision, and therefore not give the "green light" to the use of such unfair tactics by prosecutors throughout this Eighth Circuit.

WHEREFORE, Charles L. Bussey, Jr., Appellant, prays that a rehearing be granted and that on rehearing granted this Court's Decision dated August 20, 1991, be withdrawn and the Court enter a new Division (opinion) in this above-styled case No. 90-2112 EM reversing the judgment of the District Court for the Eastern District of Missouri.

Dated September 3, 1991

Respectfully submitted,

/s/ CARL W. BUSSEY
411 North 10th Street, Suite 402
Saint Louis, MO 63101
(314) 231-0065

AFFIRMATION PURSUANT TO RULE 40 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

As counsel for Charles L. Bussey, Jr., the Appellant herein, I hereby certify that the foregoing Petition for Rehearing is not frivolous and is presented in good faith and not for delay.

/s/ CARL W. BUSSEY

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 3rd day of September, 1991, to:

Steven E. Holthouser, Esq.
Assistant United States Attorney
1114 Market Street, Room 421
Saint Louis, MO 63101

/s/ CARL W. BUSSEY

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1981

E Charles L Bussey Jr ASSIGNMENT NO.
RESS

	REGULAR DATE	REGULAR INIT	REGULAR TIME	EXTRA TIME* DATE	EXTRA TIME* INIT	EXTRA TIME* TIME
ENCILED						
MARIZED	5/6	HBK	3			
MARY REVIEWED	5/8	DAD	1½	6/11	DAD	½
URNS PREPARED						
ITION CHECKED						
IEWED						
NED AND MAILED	6/12	DAD	¼			
obtained	6/12	XX	½			
FERENCES						
EARCH						
CIAL						

	REPLICATING INSTRUCTION NO.	U.S.	NO.
U.S. 1040	✓	✓	
SCHEDULE A	✓	✓	
SCHEDULE B	✓	✓	
SCHEDULE D			
SCHEDULE E	✓	✓	
SCHEDULE F			
SCHEDULE G			
SCHEDULE R			
SCHEDULE SE	✓	✓	
SCHEDULE T			
SCHEDULE C			
NO. 40 or 40A	✓		

VER INFORMATION: PRE 1970 POST 1969
ITAL GAINS: LONG TERM
SHORT TERM
TRIBUTIONS
OPERATING LOSS
STMENT CREDIT
IGN TAX CREDIT

FOR SUBSEQUENT YEAR:

COMMENTS RELATING TO TIME OR BILLING:

AG & CO. CHECKLIST BEEN COMPLETED? YES NO
INTEREST IN FOREIGN BANK ACCOUNT? YES NO
AUTHORIZATION

AG & CO. TAXPAYER CONTACT:

RATION INFORMATION	FEDERAL YES	FEDERAL NO	STATE YES	STATE NO
TECT ON DECLARATION				
IMATED TAX FOR YEAR				
S WITHHOLDING TAX				
ANCE (DECLARATION)				
NSTALLMENT (1/4)				

DECLARATIONS	INSTALLMENTS FEDERAL	STATE
FIRST QUARTER		
SECOND QUARTER		
THIRD QUARTER		
FOURTH QUARTER		
TOTAL PAYMENTS		
OVERPAYMENT		
TOTAL DECLARATION		

000322

Charles L. Bussey Jr.
Review
1981

PREPARED	DATE	INDEX
REVIEWED DJW	DATE 5/14/82	

Assemble w/P's into folder.

(2) Ref no Amended Form 1065 w/ K-1's was filed for Eastview Terrace, ~~we~~ should suggest this to avoid a problem w/ guaranteed payments.

Interest on Missouri Assessments s/b $82 — Pass immaterial

Didn't taxpayer pay the $107.05 of tax for 1980 to City of St. Louis? Yes pick up interest that not taxes?

O.K. → These were personal property taxes!

Charles had a $10,000 C.D. held as collateral @ City Bank → Is interest from the bank only $276?

He said this was correct. Look only for part of yr O.K.

Who is the $1,000 contrib. to? Are we sure this qualifies?

PUSH-EXCEL INC
Per talks disc w/ Mr. Bussey this is charitable org. + not political

Need Form 4562 for Depreciation on Sch C.

What about sales tax on auto $631.13?

changed

17

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APPENDIX E

APPENIDX F

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

> No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces; or in the Militia, when in actual service in term of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. sec. 1001. Statements or entries generally.

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false,,

fictitious or fraudulent statements or representation, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

26 U.S.C. sec. 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax, or required by this title or by regulation made under authority thereof to make a return (other than a return required under authority to section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. sec. 7206(1). Fraud and false statements

Any person who - - -

(1) *Declaration under penalties of perjury.* — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter or:

Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

No. 91-1035

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES L. BUSSEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the district court properly gave the jury a "conscious avoidance" instruction.

2. Whether the government was required to prove that petitioner committed an affirmative act of the type listed in *Spies* v. *United States*, 317 U.S. 492 (1943).

3. Whether the district court abused its discretion in excluding testimony of an accounting expert offered to attack the credibility of a government witness.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 942 F.2d 1241.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1991. A petition for rehearing was denied on September 23, 1991. The petition for a writ of certiorari was filed on December 23, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of filing false income tax returns for the years 1981, 1983, and 1984, in violation of 26 U.S.C. 7206(1); failing to file a tax return for 1982, in violation of 26 U.S.C. 7203; and filing a false statement with the Department of Housing and Urban Development (HUD), in violation of 18 U.S.C. 1001. He was sentenced to three years' imprisonment and directed to pay the costs of prosecution. The trial judge also ordered petitioner to make restitution to HUD in the amount of $7,883. Pet. App. A26.

1. Petitioner, an attorney, formed Eastview Development Company, Inc., in 1978 to build an apartment complex in Little Rock, Arkansas. Petitioner's father, Charles L. Bussey, Sr., and two of his friends were initially the sole shareholders and officers of the corporation, but petitioner replaced his father after Bussey, Sr., was elected to the Little Rock Board of Directors, the city council. William A. Thomas, an experienced real estate appraiser, developer, and consultant, acted as a consultant to petitioner. Petitioner, Thomas, and J & B Management Company (J & B), a real estate syndication firm, subsequently formed the Eastview Terrace Limited Partnership (Partnership), which replaced Eastview Development as the builder of the apartment complex. Petitioner and Thomas were the sole general partners, each having a one and one-half percent interest in the Partnership's capital. J & B was a limited partner. Pet. App. A2-A3.

Pursuant to a development agreement between the general partners, the Partnership, and J & B, the Partnership was to pay petitioner and Thomas a de-

veloper's fee in four separate guaranteed payments, with equal payments of $174,084 in 1981, 1982, and 1983, and an additional amount, which depended on the amount of the final mortgage on the project, to be paid in 1984. Petitioner and Thomas agreed between themselves that Thomas would receive only his standard consulting fee of $40,000 plus expenses, and that the remainder of the guaranteed payments would go to petitioner. Gov't C.A. Br. 1-3; Pet. App. A3.

Following the initial closing on the apartment project in April 1981, the first guaranteed payment of $174,084 was deposited into a bank account opened in the name of the Partnership. Petitioner and Thomas were the signatories for the account. Pursuant to the development agreement, petitioner wrote two checks, in the amounts of $90,000 and $84,084, payable jointly to himself and Thomas. The checks were endorsed by both men and redeposited into the Partnership's account. Pet. App. A3.

The Partnership's 1981 tax return (Form 1065) was prepared by an accountant who distributed Schedules K-1 to petitioner and Thomas as general partners. The Schedules K-1 listed the guaranteed payment as income and attributed half of the total payment ($87,042) to each individual. After receiving his Schedule K-1, Thomas directed his accountant to notify the Partnership's accountant that his Schedule K-1 was incorrect because Thomas had been paid only his consulting fee plus expenses, an amount less than that reflected on the Schedule. Upon his receipt of his Schedule K-1, petitioner placed it in a box with his other financial records; he subsequently asserted that he did not read the Schedule K-1. Pet. App. A3-A4.

At the time his 1981 personal income tax return was prepared, petitioner told his return preparer, Irl

Steiner, that the 1981 Schedule K-1 was incorrect because the $87,042 payment attributed to him had actually gone to Eastview Development Company. Steiner then informed petitioner that the Partnership's return and the Schedules K-1 would have to be amended to correspond to petitioner's return. If those forms were not corrected, Steiner told petitioner, petitioner would be required to pay additional taxes. The 1981 guaranteed payment was not reported as income on petitioner's 1981 tax return. Pet. App. A4.

Petitioner traveled to Dallas, Texas, in 1982 to obtain the second guaranteed payment of $174,084 from the attorney for J & B. That payment was again deposited in the Partnership account, and petitioner again wrote two checks for $90,000 and $84,084 to himself and Thomas. Petitioner endorsed the checks, signing Thomas's name as well as his own, and redeposited them in the Partnership's account. Petitioner also performed various management services for Maxxam Consulting Group in 1982 and received $18,000 from Maxxam that year. Pet. App. A5.

Petitioner did not file an income tax return for 1982. At trial, petitioner testified that in 1984 he attempted to provide his accountant with his 1982 records, but the accountant refused to accept the records until they had been organized. Petitioner further testified that he subsequently left the 1982 records in his car; the car was broken into and set on fire; and the records were destroyed in the fire. At a 1987 interview with an Internal Revenue Service agent, however, petitioner did not mention that the records had been destroyed, even though he admitted that he had not filed his 1982 return. Petitioner told

the IRS agent at that time that the 1982 return had not yet been prepared because he was very busy and was having trouble compiling the records. Pet. App. A5, A14-A15.

In 1983, petitioner once more traveled to Dallas to pick up the third guaranteed payment. Petitioner gave that check, in the amount of $174,084, to his father, Charles L. Bussey, Sr., who deposited it in his own checking account. Bussey, Sr., used $33,000 of the $174,084 payment to pay off some loans of petitioner's. Pet. App. A5.

The final guaranteed payment, in the amount of $131,292, was mailed to Thomas in 1984. Thomas gave the check to petitioner, who deposited it in the Partnership's account and then wrote two checks on the account, one to his father for $75,000 and one to Eastview for $55,000. Pet. App. A5-A6.

To facilitate preparation of petitioner's 1983 and 1984 income tax returns, petitioner's return preparer for those years gave him tax organizers. The organizers specifically requested any information regarding partnerships. Petitioner failed to mention the guaranteed payments in the organizers and did not show his return preparer the Schedules K-1. The guaranteed payments were not reflected on petitioner's 1983 and 1984 personal income tax returns. Pet. App. A5-A6.

In 1982, petitioner applied for, and received, a mortgage subsidy from HUD, under a program designed to assist low and moderate income families in the purchase of a house. Applicants for the subsidy were required to report all sources of income, list all assets, and dispose of any real estate they owned. They were also required to recertify their eligibility on an annual basis. On his application, petitioner

failed to list among his assets his interest in the Partnership, his ownership interest in a number of small businesses, his partnership interest in a law firm, and his ownership of a 1982 Datsun 280Z car. He also failed to include as sources of income the guaranteed payments from the Partnership and his income from his law firm. When he applied for re-certification in October 1983, petitioner did not report the $174,084 guaranteed payment from the Partnership or income he received from Maxxam Consulting Group. In addition, petitioner represented in the 1983 recertification that he had filed his 1982 income tax return in August 1983; that return, as noted above, had in fact never been filed. Pet. App. A6; Gov't C.A. Br. 16-18.

Petitioner testified in his own defense. He stated that he believed the information he provided to the government, both on the returns he filed for the 1981, 1983, and 1984 tax years, and on the documents he filed with HUD, was correct. Gov't C.A. Br. 20.

The trial court gave the following "conscious avoidance" instruction to the jury:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact.
>
> It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Pet. App. A8. The jury convicted petitioner on all counts.

2. On appeal, petitioner contended that the district court erred in giving the conscious avoidance instruction; that there was insufficient evidence supporting the guilty verdict because, he asserted, the government failed to prove that he engaged in an affirmative act in furtherance of the crimes charged and thus failed to prove that his conduct was willful; and that the district court erred in preventing one of his witnesses from testifying. The court of appeals affirmed petitioner's convictions. Pet. App. A1-A25.

a. The court of appeals held that there was sufficient evidence of petitioner's effort to avoid clear notice of the tax consequences of his actions to warrant the conscious avoidance instruction. With respect to the false return counts, the court focused on the evidence regarding the guaranteed payments petitioner received in connection with the construction of the apartment complex. Pet. App. A9-A13. The court found (*id.* at A14) that the evidence supported the inference that petitioner "knew the guaranteed payments had income tax consequences but deliberately sought to avoid learning anything about the specifics of those consequences."[1]

---

[1] With respect to the count alleging that petitioner failed to file an income tax return for 1982, the court noted that petitioner had not made clear in his brief the nature of his attack on that count. Pet. App. A14. In any event, the court of appeals did not "believe that the jury convicted [petitioner] based on the willful blindness instruction, for there was ample evidence that he willfully failed to file the 1982 return." *Id.* at A14-A15. The court pointed out that the government proved that petitioner had a duty to file a return, that he was aware of his duty to file, and that he voluntarily and intentionally violated that duty. *Id.* at A14-A16.

As regards the false statement count, which charged that petitioner failed to include income on his 1983 HUD recertification application, the court found that evidence relating to the guaranteed payments from the apartment project and evidence as to a claim by petitioner that he thought the $18,000 Maxxam payment was to be treated as income of his law firm, rather than his income, supported the inference that petitioner had "deliberately never checked to see how the law firm was treating the Maxxam money or how he should treat the guaranteed payments." Pet. App. A19.[2]

b. The court of appeals also rejected petitioner's argument that the evidence was insufficient. The court held that the government proved both the conduct and the intent necessary to convict petitioner under the statutes at issue. Pet. App. A20-A21.

c. Finally, the court determined that the district court did not abuse its discretion by excluding the testimony of an accounting expert whom petitioner intended to use to attack the credibility of the accountant who prepared his 1981 return. The appellate court held that the testimony was inadmissible under Fed. R. Evid. 608(b), which prohibits the use of extrinsic evidence of specific conduct to attack a witness's credibility. Pet. App. A22-A24.

---

[2] The court of appeals also rejected petitioner's contention that the conscious avoidance instruction permitted the jury to substitute willful blindness for knowledge. It found that the trial court's instructions on this charge "clearly emphasized the importance of finding specific intent to violate the law." Pet. App. A18.

ARGUMENT

1. Petitioner argues (Pet. 8-19) that the court of appeals erred in approving the "conscious avoidance" or "deliberate ignorance" instruction given at trial. The instruction informed the jury that it could infer the defendant's knowledge "from proof that [the] defendant deliberately closed his eyes to what would otherwise have been obvious to him." Pet. App. A8. The instruction went on to state that it was "entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence" and that the inference may not be drawn from "[a] showing of negligence or mistake." *Ibid.*

Petitioner asserts that the conscious avoidance instruction "allowed the specific intent element of willfulness to be proven by a 'knew or should have known,' i.e., negligence standard," Pet. 10, and "reduced the level of proof of knowledge in felony tax crimes required to be far less than the constitutionally required 'beyond a reasonable doubt' standard," *ibid.*

Petitioner is incorrect. As the court of appeals noted, "the instruction expressly informed the jury that negligence or mistake did not constitute willfulness or knowledge." Pet. App. A9 n.8. Further, the instructions, taken as a whole, as they must be, *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973), made it abundantly clear that petitioner could not be convicted unless he knew that the guaranteed payments on the apartment project and the Maxxam payment were his income. See Jury Instructions 20-22, 50 (intent); *id.* at 31, 42-44 (good faith). The conscious avoidance instruction simply advised the jury that it was permissible to infer that actual knowledge

from evidence that petitioner took steps to avoid being directly and unequivocally confronted with the truth.[3]

a. As this Court has made clear, a party may successfully challenge a permissive inference—like that licensed by the conscious avoidance instruction in this case—only by "demonstrat[ing] its invalidity as applied to him." *County Court of Ulster* v. *Allen*, 442 U.S. 140, 157 (1979). Because a permissive inference "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof," it is invalid "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Id.* at 157. See also *Leary* v. *United States*, 395 U.S. 6, 32-36 (1969). Thus, the conscious avoidance instruction given in this case is invalid only if no rational juror could have inferred that petitioner knew that the guaranteed payments and the Maxxam consulting fee were income from his conduct in deliberately avoiding knowledge of facts relating to those items of income.[4]

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[3] Nor did the district court's instruction, as petitioner contends (Pet. 10-11), conflict with this Court's decision in *Cheek* v. *United States*, 111 S. Ct. 604 (1991). In that case, the Court held that, because the issue in a criminal tax case is whether the defendant had actual knowledge of his legal duty, it is error to instruct the jury that a good-faith mistake of law must be objectively reasonable to negate willfulness. The instruction at issue here did not state or suggest in any way that petitioner's claimed lack of knowledge had to be objectively reasonable to negate willfulness.

[4] Petitioner contends (Pet. 13, 16-17) that the instruction shifted the burden of proof. That contention is incorrect. The instruction merely informed the jury of a permissive inference and did not state or suggest that petitioner was required to prove anything. See *United States* v. *MacKenzie*, 777 F.2d 818, 818-819 (2d Cir. 1985), cert. denied, 476 U.S.

There was more than ample evidence in this case to support the conclusion that petitioner deliberately avoided knowledge of the tax consequences of the guaranteed payments and the Maxxam consulting fees. Petitioner's own accountant informed him that the 1981 Schedule K-1 indicated that the guaranteed payment was income to petitioner and that, if petitioner disagreed with that conclusion, he should contact the Partnership's accountant to see to it that amended Schedules K-1 were prepared. To be sure, the jury could have inferred from that fact alone that petitioner knew that the guaranteed payments were income. But the jury also could have inferred that petitioner had deliberately sought to avoid familiarizing himself with the details and tax consequences of those payments so that he could later assert that he was not aware that he should have paid taxes on that income. After the accountant's warning, petitioner failed to contact the Partnership's accountant, and he failed to provide his tax preparer in subsequent years with either the Schedules K-1 or any information about the Partnership. The jury could reasonably infer from those facts that petitioner simply did not want to be on record as having been told that the payments were income and had to be reported.[5]

1169 (1986); *United States* v. *Ciampaglia*, 628 F.2d 632, 642 (1st Cir.), cert. denied, 449 U.S. 956 (1980). Furthermore, the district court instructed the jury on the government's obligation to prove each element of each offense beyond a reasonable doubt. Jury Instructions 27, 37, 40, 46. The court also made clear that the burden of proof rested entirely with the government and that the burden never shifts to the defendant. Jury Instruction 3. See *United States* v. *Ciampaglia*, 628 F.2d at 642.

[5] As the court of appeals noted (Pet. App. A12), while petitioner was not under a legal duty to contact an accountant

There was also sufficient evidence that petitioner knew that the Maxxam consulting fee was income. Petitioner contended that he believed the payment was not income to him because it was to be treated as income of his law firm and that he received it as a reimbursement for his contribution of $10,000 to the start-up of the firm. Pet. App. A18-A19. The firm, however, did not treat the payment as income. Indeed, petitioner received the money directly from Maxxam; the firm had no record of the checks; and petitioner's law partner, whom petitioner allowed to take care of all of the firm's financial affairs, had no idea how much petitioner was receiving from Maxxam. Moreover, petitioner admitted that he had not performed legal services for Maxxam and that the firm had no claim to the money. *Id.* at A19. Thus, petitioner was aware of facts strongly indicating that the Maxxam payment was his own income. The only step he failed to take was to check with his partner to find out how the firm was treating the payment. As the court of appeals determined (*ibid.*), the jury could reasonably infer that petitioner's failure was deliberate and thus a further indication that petitioner "knew the $18,000 Maxxam payment was income to him."

In short, as the court of appeals stated, petitioner "asked no questions, sought no guidance, did no[] research, all despite his claimed unfamiliarity with partnership taxation. Nor did he read his returns or the contracts he signed." Pet. App. A14. A reasonable jury could easily have found that such conduct constituted a deliberate effort by petitioner on a

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or tax expert about these matters, his failure to do so was evidence of conscious avoidance of knowledge. *United States* v. *Hiland*, 909 F.2d 1114, 1131 (8th Cir. 1990).

number of different occasions to avoid taking steps that would make it clear that he knew that both the guaranteed payments and the Maxxam consulting fee were income to him. If the jury did so find, the jury surely could have inferred from petitioner's repeated and deliberate avoidance efforts that he actually knew of the tax consequences of the guaranteed payments and the Maxxam consulting fee. In any event, the court of appeals' determination that the inference was sound on the particular facts of this case does not warrant further review.

b. Petitioner contends (Pet. 11, 18) that review is warranted because the courts of appeals disagree concerning when a conscious avoidance instruction may be given. None of the cases cited by petitioner, however, presents a direct conflict with the court of appeals' decision in this case.

In some of the conscious avoidance cases cited by petitioner, the courts of appeals affirmed a conviction in which some type of conscious avoidance instruction was given. See, *e.g.*, *United States* v. *Feroz*, 848 F.2d 359, 360 (2d Cir. 1988); *United States* v. *Picciandra*, 788 F.2d 39 (1st Cir.), cert. denied, 479 U.S. (1986). Those cases therefore do not conflict with the decision below.

In other cases, courts have reversed convictions, but the instruction that formed the basis for the reversal was entirely different from that given in this case. For example, in *United States* v. *de Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991), the jury was instructed that "[t]he defendant's knowledge may be established by proof that the defendant was aware of a high probability [of the fact at issue] unless despite this high probability the facts show that the defendant actually believed that the [fact was not true]." That definition of knowledge was

not given to the jury in this case.[6] The Tenth Circuit's decision in *de Francisco-Lopez* accordingly rested on an issue—the validity of that definition of knowledge—that is not raised by this case.

Finally, petitioner cites several cases, such as *United States* v. *Giovannetti*, 919 F.2d 1223 (7th Cir. 1990), involving conscious avoidance instructions that bear some resemblance to the instruction given here, and in which the court of appeals held that the instruction was erroneous because the case did not present a question of conscious avoidance. See also *United States* v. *Alvarado*, 838 F.2d 311 (9th Cir.), cert. denied, 488 U.S. 838 (1988); *United States* v. *Garzon*, 688 F.2d 607 (9th Cir. 1982); *United States* v. *Rivera*, 944 F.2d 1563, 1570-1573 (11th Cir. 1991);[7] *United States* v. *Sanchez-Robles*, 927 F.2d 1070 (9th Cir. 1991). Although we question the reasoning of some of those decisions, they do not conflict with the Eighth Circuit's result in this case and would not assist petitioner in any event. In each of

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[6] We believe that the Tenth Circuit's decision in *de Francisco-Lopez* was incorrect and that it conflicts with a number of decisions of the Second Circuit. We recently asked the Court to grant the petition for a writ of certiorari in *Tomala* v. *United States*, No. 91-7051, to resolve that conflict. See 91-7051 Br. for the United States at 7-14. (We are providing petitioner with a copy of our brief in *Tomala*.) Because the instruction at issue in *de Francisco-Lopez* and *Tomala* differs from the instruction at issue in this case, this case need not be held for this Court's disposition of *Tomala*.

[7] In *Rivera*, the Eleventh Circuit found that giving the instruction in that case—which differed from the instruction given here, see 944 F.2d at 1570 n.25—was erroneous, but affirmed the defendants' convictions because the evidence of knowledge was so substantial that the error was harmless. See 944 F.2d at 1572-1573. See also *United States* v. *Kelm*, 827 F.2d 1319, 1324 (9th Cir. 1987).

those cases, as the court viewed the evidence, no question of conscious avoidance was presented because the evidence showed that the defendant had either actual knowledge or no knowledge at all of the facts in question. See, *e.g.*, *Giovannetti*, 919 F.2d at 1228. In this case, as explained above, substantial evidence was introduced showing that petitioner on several occasions deliberately avoided exposing himself to information and advice that would make it unavoidably clear that he knew that the guaranteed payments and the Maxxam consulting fee constituted income that had to be reported on his tax returns. Accordingly, there is no conflict in the circuits as to the correct result in cases like this one.

2. Relying on *Spies* v. *United States*, 317 U.S. 492 (1943), petitioner asserts (Pet. 19-22) that the evidence was insufficient to support his convictions on the tax felony counts, because there was no evidence that he committed an affirmative act of the type required by *Spies*, 317 U.S. at 499.

In *Spies*, 317 U.S. at 492, the defendant was charged with willfully attempting to evade or defeat a tax. This Court held that, to prove the crime of tax evasion, the government had to do more than simply establish that the defendant had failed to file a return and had failed to pay the tax. 317 U.S. at 498-499. It had to show, in addition, that the defendant had committed some affirmative act for the purpose of attempting to evade or defeat the assessment or payment of his taxes. *Ibid.* The Court listed some of the types of affirmative conduct that would suffice for the misdemeanors of failure to file and failure to pay and for the felony of attempted evasion. *Id.* at 499.

The government was not required to prove such acts in this case. The tax felony counts in this case

charged petitioner with making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1). The "affirmative acts" required by that statute are making and subscribing a false return or other document under penalties of perjury.[8] The evidence established that petitioner committed that affirmative conduct. Even in a tax evasion prosecution, his conduct would constitute the necessary affirmative act. *See Sansone* v. *United States*, 380 U.S. 343, 351-352 (1965) (filing false return is affirmative act of evasion).

Petitioner appears to complain, however, that the finding of willfulness may have been based on omissions—his failures to ascertain the specific tax consequences of the payments he received in connection with the apartment construction project. But *Spies* does not hold that willfulness must be established through affirmative conduct on a defendant's part. Indeed, the Court recognized that omissions may be willful. 317 U.S. at 499. The affirmative act requirement simply reflects the requirement of the statute that there be some "attempt" to evade. *Id.* at 498-499.[9]

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[8] The elements of 26 U.S.C. 7206(1) are (1) making and subscribing a return or other document under penalties of perjury, (2) knowing that it is not true and correct as to a material matter, and (3) willfulness. *United States* v. *Bishop*, 412 U.S. 346, 350 (1973).

[9] Petitioner finds it "baffling" that the court of appeals could conclude that he had directed Steiner, his tax return preparer, away from the 1981 payment, when Steiner had the Schedule K-1 supplied to petitioner by the Eastview Partnership's accountant. Pet. 20 n.7. But while Steiner may have had "superior knowledge regarding tax preparation" (*ibid.*), it was petitioner who would have had knowledge of the facts regarding the payment. See *United States* v. *Pomponio*, 563 F.2d 659, 663 (4th Cir. 1977), cert. denied, 435 U.S. 942

3. Finally, petitioner claims (Pet. 22-30) that the trial court violated his constitutional right to a fair trial by refusing to permit one of his proposed witnesses, an accounting expert, to testify.

On direct examination, petitioner's 1981 return preparer, Irl Steiner, testified that petitioner gave him the Partnership's 1981 Schedule K-1; that petitioner had said that the income reflected on the Schedule K-1 was not his but had gone to Eastview Development Company; and that Steiner had told petitioner that the Partnership's return and the Schedule K-1 should be amended to reflect that fact, or else petitioner would have to pay additional taxes. On cross-examination, Steiner testified that the accountant who reviewed his work had, in accordance with a standard accounting practice, prepared a checklist of items that needed to be done with respect to petitioner's return. One of the items on the list was to suggest the filing of an amended Form 1065 (partnership return). Steiner conceded that he had not checked off that item, but he testified that he had nonetheless discussed the item with petitioner. Pet. App. A4.

Petitioner sought to introduce the testimony of an accounting expert, Steven Conway, in an attempt to show that Steiner never told petitioner to have the Schedule K-1 amended. Pet. App. A22-A23. In his offer of proof, petitioner stated that Conway would testify that it was against standard accounting procedures to fail to check off an item on the checklist following a discussion regarding that item, and that

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(1978). Petitioner affirmatively acted to mislead his accountant when he said the payment had been made to the Eastview Development Company rather than himself. Pet. App. A10; *id.* at A4 n.4.

Steiner's failure to mark the item indicated that, in fact, he never discussed the item with petitioner. *Id.* at A23-A24.

The proposed testimony was properly excluded on relevance grounds. The testimony did not directly contradict Steiner, since Conway had no knowledge of whether Steiner had, in fact, discussed the unchecked item with petitioner. Nor did the testimony add anything significant by showing that Steiner ordinarily would be expected to check off the item on the list regarding the Schedule K-1 if Steiner had discussed that matter with petitioner. Since Steiner conceded that he failed to check off that item as he should have, Conway's testimony would have added nothing of significance to the information available to the jury in weighing Steiner's credibility with respect to whether he advised petitioner to amend the Schedule K-1.

As the court of appeals pointed out, petitioner was afforded every opportunity to impeach Steiner on cross-examination on that issue. He took advantage of that opportunity by questioning Steiner about the checklist and getting Steiner to concede his failure to check off the appropriate item. Pet. App. A24. Thus, petitioner was not, as he asserts (Pet. 24-26), denied his constitutional right to attack the credibility of a government witness.

In this case, despite his claims to the contrary (Pet. 27-29), petitioner did not offer Conway's testimony to show bias on Steiner's part. As the court of appeals found (Pet. App. A24) upon review of petitioner's offer of proof, petitioner sought to introduce the testimony of Conway only to attack Steiner's credibility on the question of the checklist. Because Conway's testimony added nothing of significance on

that issue, the district court did not abuse its discretion by excluding that evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES L. BUSSEY, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

I

DOES A TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE AN ACCUSED'S FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, WHEN THAT TRIAL COURT GIVES THE JURY THE *JEWELL* OR OSTRICH INSTRUCTION THAT REDUCED THE STATUTORILY PRESCRIBED AND JUDICIALLY APPROVED SPECIFIC INTENT STANDARD OF WILLFULNESS IN FELONY CRIMINAL TAX CASES TO A SHOULD-HAVE-KNOWN STANDARD OF NEGLIGENCE?

II

WHERE AN ACCUSED IS CHARGED WITH FELONY CRIMINAL TAX OFFENSES AND THE GOVERNMENT FAILS TO PROVE ANY AFFIRMATIVE ACT CONDUCT ON THE PART OF THE ACCUSED, DOES THE TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE THE ACCUSED'S FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY NOT GRANTING A JUDGMENT OF ACQUITTAL?

III

DOES A TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE AN ACCUSED'S FIFTH AND SIXTH AMENDMENT CONSTITUTIONAL RIGHTS TO A FAIR TRIAL WHEN IT LIMITS THE ACCUSED'S ABILITY TO PRESENT EVIDENCE OF A LACK OF WILLFULNESS AS A DEFENSE BASED ON FEDERAL RULE OF EVIDENCE 608(b), IN FELONY CRIMINAL TAX CASES REQUIRING THE GOVERNMENT TO PROVE WILLFULNESS BEYOND A REASONABLE DOUBT?

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OPINIONS BELOW

The Opinion of the Eighth Circuit Court of Appeals (Pet. App. A1-A25) is reported at 942 F.2d 1241. The opinion of the District Court (Pet. App. A26-28) was not reported.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on August 20, 1991; a rehearing was sought and denied on September 23, 1991. The petition for a writ of certiorari was filed on December 23, 1991. The brief for the United States in

opposition was filed on April 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT

Petitioner filed a petition for a writ of certiorari on December 23, 1991. Thereafter, Respondent filed a brief for the United States in opposition on April 10, 1992. Petitioner is filing this reply to Respondent's brief in opposition. However, Petitioner refers this Honorable Court to his petition for a writ of certiorari as containing the reasons why said petition should be granted, and in this reply will seek to address and point out to this Court the errors in reasoning and fact contained within the Argument portion of Respondent's brief in opposition.

REPLY TO RESPONDENT'S FIRST ARGUMENT

a. In its brief for the United States in opposition, Respondent United States of America argues that Petitioner's petition for a writ of certiorari before this Honorable Court should be denied. Petitioner's stated reason for requesting certiorari is because of the disagreement and confusion throughout the federal court circuits as to the propriety of the giving of the *Jewell* instruction[1] and the resulting need for guidance from this Court (Pet. 6-18). Respondent agrees that there is indeed conflict and disagreement. Resp. 13-15. Respondent asserts that no conflict exists as to the *Jewell* instruction given to the jury in this case. This, even though Respondent acknowledges that it recently asked this Court to grant the petition for a writ of certiorari filed in *Tomala v. United States,* No. 97-7051 (March, 1992), in order to resolve the conflict over the issue of the giving of the *Jewell* instruction. Resp. 14, note 6.

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[1] The *Jewell* instruction has also been referred to throughout the circuits as the "deliberate indifference" instruction, the "conscious avoidance" instruction and the "ostrich" instruction.

On page 14 of its brief in *Tomala, id.*, Respondent states:

> In sum, we agree with petitioner that the circuits are in conflict concerning whether an instruction such as the one given in this case properly defines "knowledge" for purposes of the criminal law and thus can properly be given whenever knowledge is an issue in a criminal case. Since the issue arises quite frequently, further review by this Court to resolve the conflict is warranted.

In simultaneously arguing that Petitioner's petition for a writ of certiorari should be denied (Resp. 19) while at the same time having argued only a month ago in *Tomala* that the writ sought therein should be granted, Respondent is engaging in the highest form of hypocrisy.

There are striking similarities between the *Tomala* case and the present case of *Bussey v. United States*. While the accused was charged with illegally importing cocaine into the United States in *Tomala*, the defendant therein testified that she was given the suitcase containing said drugs by another party for delivery to a third party and did not have any knowledge that the suitcase contained drugs. The *Jewell* instruction given to the jury in that case was:

> However, it is not necessary for the government to prove to an absolute certainty that [petitioner] knew that she possessed narcotics. [Petitioner's] knowledge may be established by proof beyond a reasonable doubt that [petitioner] was aware, was aware of a high probability that the suitcase contained narcotics unless, despite this high probability, the facts show that [petitioner] actually believed that the suitcase did not contain narcotics.

Tomala 12/4/90 Tr. 438-439.

In Petitioner herein's case, the form of the *Jewell* instruction given to the jury read:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of that fact.
>
> It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Pet. App. A8.

The definition of "knowledge" contained within Section 2.02(7) of the Model Penal Code, and approved by this Court in *Leary v. United States,* 395 U.S. 6, 46 n.93, states that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, *unless he actually believes that it does not exist*" (emphasis added).

This definition of knowledge, or form of the *Jewell* instruction containing the above-emphasized limiting clause, was the form approved by this Court in *Leary, id.,* given in *Tomala,* and supported as correct by Respondent.[2] But in two recent cases from the Eighth Circuit, it was held that said limiting phrase of "unless he actually believes that it does not exist" is not required. In *United States v. Hiland,* 909 F.2d 1114 (8th Cir. 1990), the court wrote:

> We reject [appellant's] assertion that [a willful blindness] instruction must specifically state that a defendant has

[2] *See* the government's brief in *Tomala* at 9, 13, where Respondent argues that the form of the instruction used in *Tomala* is correct.

> knowledge of a certain fact only if he is aware of a high probability of its existence, unless he actually believes that it does not exist. *Although the Second Circuit has taken this position . . . our decisions have not required the inclusion of such language in a willful blindness instruction.*

909 F.2d at 1130 (emphasis added, citations omitted). *See also Mattingly v. United States*, 924 F.2d 785, 792 (8th Cir. 1991), in which the unconscious avoidance instruction was allowed absent the limiting clause.

In both *Tomala* and *Bussey*, the *Jewell* instruction that was given permitted each respective jury to find knowledge based upon "conscious avoidance". This in effect shifts the burden of proof to the defendant, for the prosecution need only show that the defendant recognized the likelihood of a particular fact through circumstantial evidence. The instruction given in *Tomala*, although shifting the burden of proof, at least contains the "unless" or limiting clause which permits a jury to find a lack of knowledge despite a high probability of knowledge if facts may show that the defendant still believed otherwise. In Petitioner's case, there was not any limiting instruction given. This would at least have allowed a jury not to find knowledge based upon a theory of conscious avoidance if there was evidence that despite any high probability of an intent to avoid enlightenment, facts showed Petitioner not to have actually believed that he was willfully and knowingly subscribing to a false tax return. The presence of the "unless" clause would have highlighted the importance of Petitioner's actual state of mind, thereby minimizing the risk that the "high probability" language would cause the jury to convict him even though he held an honest contrary belief.

If neither subjective certainty nor objective confirmation can be proven, the conviction violates Petitioner's constitutional rights as Respondent had not met its burden of proving Petitioner's knowledge.

b. Respondent also raises the issue of permissive inference as interpreted by the case of *County Court of Ulster v. Allen*, 442 U.S. 140 (1979), in an effort to argue that the giving of the *Jewell* instruction is not reason for the granting of Petitioner's Petition for a writ of certiorari. Resp. 10. However, the conscious avoidance instruction is not "some" fact presented to a jury with a defendant having an opportunity to challenge it. Indeed, the conscious avoidance instruction is a *mandatory* instruction to the jury. Therefore, and given the *County Court of Ulster v. Allen* case, *id.*, said instruction must be viewed in light of its mandatory presumptive nature. As to a viewing in that light, the *Ulster* Court stated as follows:

> A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. (Citations omitted.)

Id. at 157.

This argument set forth in *Ulster* above is entirely consistent with Petitioner's argument that the giving of the *Jewell*, or conscious avoidance, instruction shifts the burden of proof to a defendant. Pet. 13-17. The basic question would be one of "How does the unproven allegations cited by the government[3] relate to a claim of willfully subscribing to a false tax return?" Even assuming that such allegations had been proven, they do not mandate a finding of the unrelated commission of the offenses

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[3] The Respondent continues to argue in its Statement of Facts and elsewhere that Petitioner's accountant informed him that his tax returns would have to be amended. As Petitioner will demonstrate hereafter, that and similar accusations that Respondent represents as fact were not proven at trial.

charged. The objective and independent evidence suggests that the accountant Steiner *did not tell* the Petitioner of the need for filing an amended Schedule K-1. He (Steiner) *did not "clear"* the item regarding an amended Schedule K-1 as required by generally accepted accounting principles. Moreover, both Steiner and one of Steiner's accounting partners approved the 1981 tax return as it was then prepared for mailing to the Internal Revenue Service.

c. There is mass confusion and disagreement between, throughout and within the federal circuits as to the giving of the *Jewell* instruction, the form to be given, and in what type cases it should be given. Congress has specifically approved the giving of the *Jewell* instructions, but only in civil forfeiture cases under the Comprehensive Drug Abuse Prevention and Control Act of 1970.[4] The burden of proof that has to be met by the government in seeking a criminal conviction is still one of "guilt beyond a reasonable doubt". As argued in Petitioner's petition for writ of certiorari, the giving of the *Jewell* instruction relieves the government of that burden and should, therefore, not be permitted. Pet. 6-19.

Respondent admits to the confusion and disagreement concerning the giving of the *Jewell* instruction. Resp. 14, note 6. But Respondent is in error in arguing against the granting of Petitioner's petition for writ of certiorari. Petitioner respectfully suggests that the instant case presents the issues of the propriety of the giving of the *Jewell* instruction and in what, if any, form it is to be given in equal or greater importance and relevance than does the *Tomala* case.

While the Respondent agrees that there must be guidance from the Supreme Court of the United States as to what constitutes knowledge in a drug trafficking case, there must also be

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[4] Section 511; 21 U.S.C. Sec. 881.

guidance as to what is "knowledge" and willfulness and knowledge in subscribing to a false tax return. Constitutional rights have been circumscribed in drug trafficking cases due to the severity of the problem and its threat to the very existence of our society. Not all of our citizens are criminals who will one day deal in drugs. But they are all subject to our complicated tax reporting laws, which should be uniform and apply equally irrespective of the federal circuit in which he or she may be prosecuted for their alleged violation. This Court must clear the confusion and issue its definitive decision as to if, and under what circumstances, the giving of a *Jewell* instruction is proper in any tax case. The decision of no other court can suffice.

REPLY TO RESPONDENT'S SECOND ARGUMENT

In attempting to address Petitioner's argument that the government in this case had failed to prove any affirmative act conduct on his part which must be proven for a conviction (Pet. 1922), Respondent argues that the government was not required to prove any acts of affirmative conduct as set forth, or similar to that set forth, in *Spies v. United States*, 317 U.S. 492 (1943) (Resp. 15-16). Petitioner suggests that *Spies* speaks for itself. Something more than a mere failure to file a tax return or to pay a tax was required for the government to obtain a conviction for willfully and knowingly subscribing to a false tax return. In *Spies*, this Court held that this "something more" was an affirmative action, i.e., "some willful commission in addition to the willful omissions that make up the list of misdemeanors." *Id.* at 499.

Respondent argues that the government was not required to prove some affirmative act conduct as dictated in *Spies*. It then "backtracks" on its position somewhat and acknowledges that proof of affirmative acts were required for the conviction(s) in the instant case. Respondent contends that although willfulness and knowingly subscribing to a false tax return are affirmative acts that must be proven, such acts were proved by the evidence. Resp. 16. As to that proof, Respondent misstates that Petitioner's

1981 tax return preparer (Irl Steiner) had requested that Petitioner provide to Steiner an amended Schedule K-1 but that Petitioner had not done so. (*See* Resp. 17.)

These representations throughout Respondent's brief of Petitioner's accountant having informed Petitioner as to errors within the Schedules K-1 and the need for Petitioner to amend the same, are not true. They are misrepresentations. The single truth is that the prosecutor at Petitioner's trial made the statement as to Steiner having informed Petitioner of the need to obtain amended Schedules K-1 in his closing argument. The Court of Appeals in Petitioner's case, while also referring to such claimed testimony as most critical, does not cite any actual transcript page for the actual source of same, *because that testimony does not exist.*

In response to a direct question by the Respondent as to whether Steiner had explained to Petitioner the need for an amended K-1, Steiner responded that:

> I believe I indicated that with the 87 thousand included, it would result in additional taxes that he owed at that particular point. We may — and I don't recall at this point — we may have computed it within that, with it.

Trial Tr. 3-188.

In response to a similar question upon cross examination of "Now, do you recall at what point you did make the suggestion to him to seek a correction of the K-1?", Steiner responded as follows:

> I would believe that I would do this with any person's return, if the information was incorrect or been informed of it at that time, would have informed the taxpayer to have the item corrected and —

Trial Tr. 3-248.

Respondent also states that although Steiner had conceded that he had not checked off the item instructing the need for an amended K-1, Steiner had nonetheless testified that he had discussed the item with Petitioner. Resp. 17. Such is not true; at best Steiner could testify that he merely believed he *may have* (emphasis added) done so.

REPLY TO RESPONDENT'S THIRD ARGUMENT

In attempting to respond to Petitioner's argument regarding the error committed by the trial court in refusing to allow the expert witness Steven Conway to testify, Respondent does not respond. After again erroneously representing to this Court that Steiner had testified that he had informed Petitioner of the need for an amended Schedule K-1, Respondent writes that Conway's testimony was excluded on relevancy grounds. Resp. 18. Despite Respondent's attempt to characterize what the testimony of Conway would have been, a proffer is on the record and Petitioner refers this Court to his offer of proof as to what that testimony would have truly been. Pet. A-23.

Petitioner's point is that Conway's testimony was improperly excluded by the trial court on the stated basis of Federal Rule 608(b). Pet. 22-30. Respondent does not even refer to said Rule in its Argument, nor does Respondent make an effort to distinguish the case of *United States v. Abel,* 469 U.S. 45 (1984).

CONCLUSION

For the reasons set forth in his petition for a writ of certiorari, Petitioner respectfully requests that said petition be granted.

Respectfully submitted,

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